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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

The petitioner seeks a review under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, of a decree of the Circuit Court of Appeals for the Second Circuit, entered on August 8, 1952 (R. 73-80), denying enforcement to and setting aside an order issued by the National Labor Relations Board against Rockaway News Supply Co., Inc. (R. 10-14). Petition for Certiorari was filed on September 5, 1952 and Certiorari was granted on October 27, 1952.

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit were filed on May 12, 1952 (R. 73-80), and are reported at 197 F. 2d 111. Findings of fact, conclusions of law and order of the National Labor Relations Board (R. 7-36) are reported at 95 NLRB 336.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

Question Presented.

Whether an employer violates the National Labor Relations Act in discharging an employee, not in order to discourage union membership or in manifestation of a desire to obstruct unionization, but because the employee refuses to perform those parts of his normal duties which involve crossing a picket line of a union other than his own, at a place of business other than that of his employer.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. iv-vii.

Statement of the Case.

The material facts of this case are not in dispute. The Respondent discharged an employee (hereinafter referred to as "Waugh") who refused to perform those phases of his normal duties which involved crossing a picket line set up by an unrelated union at a place of business owned and operated by an unrelated employer. From a holding by the United States Court of Appeals for the Second Circuit, to the effect that this discharge did not violate the National Labor Relations Act, the Petitioner, the National Labor Relations Board, which had previously ruled to the con-

trary, has brought this proceeding. It should be mentioned here that the Court of Appeals for the Seventh Circuit had at an earlier date reached a result similar to that reached by the Second Circuit in this case (*N. L. R. B.* v. *Illinois Bell Telephone Company*, 189 F. 2d 124, cert. den. 342 U. S. 885 (1951)).

The incident leading to this litigation occurred in the context of a strike called by the Nassau County Typographical Union against the publishers of the Nassau Daily Review *Star*. In connection with its strike, the Typographical Union set up a picket line at the plant of the Daily Review Corporation, Long Island, New York. Respondent is in the business of wholesale distribution of New York newspapers and nationally circulated magazines, and was the sole vehicle of circulation on Long Island of these products as well as of the *Star*. Respondent's normal business, and Waugh's normal duties, involved the picking up of copies of the *Star* at the Long Island plant for delivery elsewhere. On the morning of March 2, 1950, Waugh informed his foreman that a picket line had been established at the *Star* plant[1] and that he would not cross the picket line to pick up any newspapers there. Waugh remained at the Valley Stream, Long Island, plant of Respondent while another member of the same Union was sent to Rockville Center, Long Island, picked up the *Star*, returned to Valley Stream, making a total trip of ten miles, and turned over the papers to Waugh, who then proceeded to make delivery of them according to his regular routine (R. 45-46). When Waugh refused to pick up the *Star* on the following day, March 3, 1950, the foreman, at Waugh's suggestion, took a truck into the plant, loaded it and drove it outside the

[1] The formal action for a picket line was taken on November 9, 1947 by the Nassau County Typographical Union. Pickets were first established on March 1, 1950. (See testimony of J. J. Byrnes —R. 53.)

Star plant to where Waugh was standing, immediately beyond and in sight of the picket line. Waugh took the newspapers, mounted the truck, and made his normal delivery.[2] On Tuesday, March 7th, the day on which Waugh was next regularly scheduled to make a pick-up at the struck plant, he again refused to perform those parts of his duties which involved entering the *Star* plant. On this occasion the foreman declared that Waugh would either have to perform all his duties, including picking up the newspapers as well as delivering them, or be fired. Waugh chose not to pick up the *Star*, and was discharged. Made the subject of a grievance, by Waugh's Union (The Newspaper and Mail Deliverers' Union of New York and Vicinity), the discharge went to arbitration, pursuant to the collective agreement between Respondent and the Union. The Arbitration Board held that "the act of Charles Waugh in refusing to obey the order of the foreman on March 7, 1950, constituted just cause for discharge."

Subsequently, in a complaint proceeding under the National Labor Relations Act, as amended, instituted by Waugh, not by his Union, the National Labor Relations Board held that Respondent's discharge of Waugh amounted to a violation of Sections 8(a)(1) and (3) of the National Labor Relations Act. The Board's position was that by the discharge the Respondent had both interfered with, restrained, and coerced Waugh in the exercise of the

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[2] Testimony of Charles M. Waugh called by and on behalf of the General Counsel for the National Labor Relations Board:

> ". . . So I told Mr. Gordon, I says, 'Well, there's the picket. I can't go across the line.' 'But,' I said, 'if you want to,' I says, 'you take my truck, load it with papers and bring it back into the street and I will deliver the papers.' And that was the procedure as I stated. Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work."

right to engage in concerted activity for mutual aid and protection, and discriminated against him to discourage membership in a labor organization.

On petition for enforcement of the Board's order, the Court of Appeals for the Second Circuit, Clark, J., dissenting, held that the discharge violated neither Section 8(a)(1) nor Section 8(a)(3) of the Act. Waugh's refusal to cross the picket line may have been a concerted activity, the Court observed *arguendo,* but it was not the type of concerted activity which the Act is designed to make immune to employer discipline imposed simply in the interests of orderly and efficient conduct of business. Furthermore, the Court ruled, there was no basis for a decision that the discharge violated Section 8(a)(3) of the Act, which makes it an unfair practice for an employer to encourage or discourage membership in any labor organization by discrimination in hire or in tenure, terms or other conditions of employment. Presumably this ruling was based on the obvious fact that in the circumstances of this case neither the object nor the effect of the discharge could have been to encourage or discourage Waugh's membership in either his own or the striking union. For all practical purposes the Board has abandoned any objection to this ruling. In Petitioner's brief submitted to this Court the only reference to Section 8(a)(3) appears in footnote 33 on page 66 and no argument is directed against the Second Circuit's finding on 8(a)(3).

Summary of Argument.

The discharge of Waugh may be held unlawful only if it is shown to be in violation either of a specific provision (or provisions) of the National Labor Relations Act, or of the general policy and intent of the Act. Neither can be shown.

A discharge of the kind involved in this case, occurring in the instant context and clearly motivated, not by anti-union considerations, but by good-faith business considerations, violates no specific provision or provisions of the Act. More than that, only a profound misunderstanding of the general intention of Congress could produce the conclusion that such a discharge somehow conflicts with the general policies and purposes of the Act. Specifically, we argue:

I. That Waugh was not engaging in a concerted activity for mutual aid and protection at all when he was discharged, and that, therefore, the discharge could not have interfered with, restrained, or coerced him in the exercise of the statutorily protected right to engage in certain concerted activities.

II. That even if Waugh's activity may properly be considered "concerted", it is not the type of concerted activity which absolutely privileges the actor against reasonably and lawfully motivated discipline by the employer.

III. That it is impossible to view the discharge of Waugh as involving discrimination in employment intended to discourage union membership within the meaning of Section 8(a)(3) of the Act and of the uniform and prevailing course of decision thereunder.

IV. That the discharge of Waugh was a discharge for cause, justified by previous dealings and existing contractual arrangement between Waugh's union and the Respondent as well as by the implicit employment contract between Waugh and the Respondent.

ARGUMENT.

I.

An employee is not engaged in a concerted activity for mutual aid and protection when he refuses during the normal course of employment to cross a picket line established by an unrelated union, where the refusal is based on his own sentiment, is not directed by his union, is not designed to make common cause with the picketing union, and is in all other respects an individual decision and an individual act.

Summary.

The Petitioner's principal contention is that Waugh's refusal to cross the picket line established at the *Star* plant amounted to a concerted activity within the meaning of Section 7 of the Act, and that, therefore, in discharging Waugh, the Respondent violated Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights granted in Section 7, including the right to engage in concerted action for mutual aid and protection. The narrowest issue raised by this contention is whether a refusal such as Waugh's—dictated entirely by personal considerations and executed entirely on an individual basis, with neither sanction nor cooperation of others in his own union—may properly be regarded as a concerted activity at all. This Court has not yet passed definitively upon the precise issue. Nevertheless, Respondent respectfully submits that sensible analysis, the opinion of this Court on a closely related issue, a carefully reasoned decision by the Court of

Appeals for the Seventh Circuit on the identical issue, and a large number of other decisions on related subjects all point to the accuracy of the contention that a refusal to cross a picket line in the circumstances of the present case is not a concerted action for mutual aid and protection within the meaning of the National Labor Relations Act, as amended.

A. The decision to refuse to cross the picket line in this case was an individual decision based on personal sentiment, a decision contrary to that reached by fellow employees performing similar work, and a decision which, viewing all the facts, indicated that the person reaching it did not intend to make common cause with the picketing Union.

Before engaging in legal analysis, it will be well to set forth the record facts concerning Waugh's refusal to cross the Typographical Union's picket line. In its decision in this case, the Board declared that "in refusing to cross the Typographers' picket line Waugh was making common cause and acting in concert with the Typographers" (95 NLRB 336, 338). The record does not support such a conclusion. On the contrary, the record discloses that Waugh was uninterested in the striking union's objectives. This fact is made evident by Waugh's readiness to deliver copies of the *Star*, once someone else had brought them to him from the struck premises. When asked at the hearing whether he objected "to delivering papers that were given to you by another union man who had crossed the picket line", Waugh's reply was an unequivocal "no" (R. 67). Waugh repeatedly stated that he refused to enter the *Star* premises because he did not want to be known as a "scab" (R. pp. 20, 45, 65). Surely reality must be distorted when, in such circumstances, it is asserted that Waugh made "common cause" with the Typographers. The immediate objective

of the Typographers in striking and establishing a picket line was to prevent the production *and the marketing* of the *Star*. When Waugh showed himself ready to deliver the *Star*, he demonstrated that he had no intention of making "common cause" with the Typographers.[3] Accurately viewed, his decision to refuse to cross the picket line, his reluctance to be called a "scab," reflected nothing more than the fundamentally inexplicable forces which tend to induce some men to "steer clear" of embarrassing situations. When the Board declared that Waugh made "common cause" with the Typographers, it engaged in an oversimplification, useful only to make the "facts" of the case conform to the Board's formula, but ultimately betrayed by the real circumstances surrounding Waugh's conduct. It is plain that Waugh was not engaging in an activity with the Typographers, to use the words of Section 7, for "mutual aid and protection".

It is equally plain that Waugh's conduct was of a solitary or individual, not of a collective or concerted, kind. The record shows that at least five of Waugh's fellow employees, assigned similar duties, did all the work normally required of them, including that involving the crossing of the picket line established by the Typographical Union in the same dispute (R. 56). The record is barren of any indication that Waugh's union either suggested or approved his refusal to do his job.

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[3] See R. 67, cross examination of Charles Waugh:

"... Q. And you made delivery of those papers?

A. Correct.

Q. So that actually you did not object to delivering papers from a strike-bound plant; is that correct? A. No.

Q. You only objected to your crossing the picket line? A. Exactly.

* * * * * * *

Q. But you did not object to delivering papers that were given to you by another union man who had crossed the picket line? A. No."

Taken together, the foregoing facts establish Waugh's refusal as an individual act based on individual sentiment; he did not act in concert with his own fellow-employees or with his own union. That being so, in order to characterize his conduct as "concerted," it is necessary to assert that he acted in concert with the Typographers Union. But such an assertion becomes speedily untenable when confronted by the fact that Waugh had no intention of making common cause with that union. Thus the indicated conclusion would seem to be either that Waugh was not engaged in a concerted activity at all, or that, if one insists upon his conduct's being viewed as "concerted", it was not concerted activity for "mutual aid and protection".

B. An individual refusal to cross a picket line in the circumstances presented by this case is not a concerted activity for mutual aid and protection within the meaning of Section 7.

Section 7 of the National Labor Relations Act provides in material part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Whether or not Waugh's refusal to cross the Typographical Union's picket line is an activity covered at all by Section 7 is one of the principal issues in this case.

The Board seeks to establish Waugh's refusal as a Section 7 activity by emphasizing the word "assist" in the first clause of Section 7. However, careful analysis of the structure of Section 7 discourages the attribution of so broad a meaning to this word "assist" as to hold that it covers a refusal to cross a picket line such as is

involved in this case. The word "assist" occurs in series with the words "form" and "join", following the declaration of employee rights to self-organization. This seriatim arrangement suggests that Congress was concerned with elaboration of the same concept in using all three words, and the persuasive conclusion is that Congress was preoccupied here with insuring a comprehensive definition of the right of employees to affiliate themselves with a union; that the words "form", "join" and "assist" were utilized by Congress to give content to the immediately preceding "right to self-organization". Cf. *Mason* v. *U. S.*, 260 U. S. 545, 553 (1923); *Russell Motor Car Co.* v. *U. S.*, 261 U. S. 514, 519 (1923). Although a search of the legislative history has turned up nothing definitive on the point,[4] the

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[4] *Cf. Sen. Rep. No. 573*, 74th Cong. 1st Sess. (1935) and H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935). The Senate Report (at p. 8) contains this rather significant language, in reference to Sections 7 and 8 of the Wagner Bill: "These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8. . . . Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair."

Time after time this Report emphasizes the point that Congress intended in the Wagner Act no more than to eliminate and to proscribe *anti-union* activities of employers. Thus: ". . . the bill [does not] . . . interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as . . . they are not used as a covert means of discriminating against or in favor of membership in any labor organization." *(Id.* at 10) and again: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in dis-

conclusion is fortified by our analysis of the general scheme of Section 7 (Point II A, *infra*), and by the fact that the Board has never heretofore thought that the word "assist" was the factor which brings a refusal to cross a picket line within Section 7. Thus, in *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board referred to such a refusal as "a protected form of concerted activity", and in its decision in the present case the Board used this language:

> "The fact that employees who participate in concerted activities are not members of the same union, or indeed of any union, or employees of the same employer, does not alter the concerted nature of such activity." (R. p. 10).

If Waugh's refusal to cross the picket line is to be regarded as a Section 7 activity in any sense, then, it must come within the terms "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

As already observed it is virtually impossible as a matter of straightforward general analysis of language and meaning to characterize Waugh's conduct as concerted action for the purpose of mutual aid and protection. The facts of the case simply do not yield naturally to such a characterization. In fact, the opinion of this Court in a significantly similar case suggests that it is never proper to characterize an individual refusal by a truck driver to cross another union's picket line as a form of concerted action. In *N. L. R. B.* v. *International Rice Milling Company*, 341 U. S. 665 (1951), the issue was whether or not a union

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criminatory treatment or loss of the opportunity for work." (*Id.* at p. 11.) For more extensive documentation of the same point from the legislative history of the Wagner Act, see *Smith, The Evolution of the "Duty to Bargain" Concept in American Law*, 39 Mich. L. Rev. 1065 (1941); *Latham, Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 Geo. Wash. L. Rev. 433 (1936).

violates Section 8(b)(4)(A) of the National Labor Relations Act simply because a picket line which it has established induces an unrelated truck driver to refuse to enter the picketed premises. If it could have been realistically held that a picket line constitutes an inducement to concerted action by a truck driver, this Court would have been obliged to rule that the picketing union in *Rice Milling* had violated Section 8(b)(4)(A). But the Court held that the union had not violated the Act, and in so holding it relied mainly on its conclusion that the truck driver had not been induced to concerted action. "* * * the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity", the Court stated, "as the section proscribes". (*Id.* at 670) The Court went on to say that "the applicable proscriptions of Section 8(b)(4) are expressly limited to the inducement or encouragement of *'concerted* conduct by the employees of the neutral employer." "That language", the Court concluded, "contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill." (*Ibid.* at 670-71; italics are the Court's.)

If the term "concerted" does not cover the conduct of a single truck driver in refusing to cross a picket line, for purposes of Section 8(b)(4), it would seem anomalous to hold that it covers the conduct of a single truck driver for purposes of Section 7 and Section 8(a)(1). There is no evident basis for the assumption that the concept of concerted action entertained by Congress varied between these two sections, and we commend to the Court the ancient though still useful maxim that the same word should be given the same meaning where used in different sections

of a single piece of legislation unless the respective contexts reasonably establish an intended shift in meaning.

Shortly prior to the announcement by this Court of its decision in *Rice Milling*, the Court of Appeals for the Seventh Circuit reached precisely the same conclusion concerning the absence of the quality of concert in individual refusals to cross a picket line. The case, *N. L. R. B.* v. *Illinois Bell Telephone Company*, 189 F. 2d 124, cert. den. 342 U. S. 885 (1951), involved a demotion of eight employees for refusing to report to work where reporting would involve the crossing of a picket line. There, as in the present case, the decisions to respect the picket line were reached individually, and the refusals were separately and individually executed. There as here the picketing union was not the bargaining representative of the employees who respected the picket line, and the objectives of the picketing union were not the objectives, at the time, of the union which was the exclusive bargaining representatives of the employees who respected the picket line. Unlike the situation in the present case, however, several of the persons who were demoted in *Illinos Bell* were actually members of the union whose picket line they respected, even though they were not employed in a bargaining unit in which that union was exclusive representative. Again unlike the present case, the picketing union there was closely affiliated with the union which was bargaining representative for the persons who respected the picket line. These distinctions add up to a stronger case for holding the refusals to cross the picket line in *Illinois Bell* a concerted activity for mutual aid and protection than the refusal involved in the present proceeding, if, indeed, any case at all can be made for the Board's proposition. Nevertheless, the Seventh Circuit held in a closely reasoned opinion that the refusal in *Illinois Bell* was not a concerted activity, or in any event

not a concerted activity for mutual aid and protection within the meaning of Section 7; and therefore that the employer did not violate Section 8(a)(1) in demoting the employees who had chosen to respect the picket line.

It is interesting to note that the Seventh Circuit found especially significant in *Illinois Bell* facts concerning the motivation of the demotees there which are almost perfectly duplicated by the known motivation of Waugh in refusing to cross the picket line established by the Typographers Union. The Court pointed out that:

> "There is no evidence that these eight employees acted in combination or concert. They did not converse with each other or any other person regarding the activity in which they engaged, that is, a refusal to cross the picket line. The record discloses unmistakably that each acted in her own individual capacity." (*Ibid.* at p. 127.)

Here too the record unmistakably discloses that Waugh acted as an individual; group sanction or action was completely absent.

This is not to argue that the only type of activity protected by Section 7 is group action. It is established that individuals, even when acting alone, are engaged in concerted action for mutual aid and protection in many instances. So where an employee representative is discharged because he has appeared before a legislative body, the discharge is an unfair labor practice, *Bethlehem Shipbuilding Corp., Ltd.* v. *NLRB* (C. A. 2, 1940) 114 F. 2d 930; or where an individual employee is discharged for circulating a petition for additional overtime, *NLRB* v. *Schwartz* (C. A. 5, 1945) 146 F. 2d 773; or where an employee has initiated a petition to improve working conditions, *NLRB* v. *Austin Co.* (C. A. 7, 1947) 165 F. 2d 592.

However, the significant burden of such cases is that in each instance the individual action was inextricably associated with group welfare in which the actor had an immediate self interest. Cf. *Phoenix Mutual Life Insurance Co.* v. *NLRB* (C. A. 7, 1948) 167 F. 2d 983, cert. den. 335 U. S. 845. Where, as in the present case, the dischargee is concerned as an individual with a strictly individual sentiment or interest, or even where a group interest is involved but may not be characterized as a legitimate labor objective, the rule is different, and rightly so. Thus in *Joanna Cotton Mills* v. *NLRB* (C. A. 4, 1949) 176 F. 2d 749, the Fourth Circuit held that an individual employee is not engaging in concerted activity for mutual aid and protection every time he circulates a petition which has something to do with working conditions. If the ultimate object in circulating the petition is to vent one's spleen upon a supervisory employee, the Court ruled, the statutory concept of mutual aid and protection is not fulfilled. In this decision the Fourth Circuit advanced precisely the theory of Section 7 which we now urge upon this Court:

> "The words 'concerted activities' are limited in meaning by the words with which they are associated . . ., which have relation to labor organization and collective bargaining, and by the purpose of such 'concerted activities', which is expressly limited by the immediately succeeding language, to concerted activities 'for the purpose of collective bargaining or other mutual aid or protection' . . . We agree that the 'concerted activities' protected by the Act are not limited to cases where the employees are acting through unions or are otherwise formally organized. It is sufficient that they are acting together for mutual aid or protection . . . It is clear, however, that to be protected the purpose of the concerted

activities must be the mutual aid or protection of the employees." (*Ibid.* at pp. 752-754).

The Petitioner is accustomed to asserting that a refusal to cross a picket line is within Section 7 (see for example Petitioner's brief pp. 33-34) precisely because it is a traditional manifestation of labor solidarity, and therefore *par excellence* an example of concerted action for mutual aid and protection, even on the theory of Section 7 advanced by the Fourth Circuit in such cases as *Joanna, supra.* See *Cyril de Cordova,* 91 N. L. R. B. 1121. Respondent respectfully submits that this assertion is an unsound and inaccurate over-generalization, that it is based upon a misconception of both the policy of the National Labor Relations Act and the specific role of Sections 7 and 8(a), and that it unjustifiably vitiates an equally traditional right of employers which common understanding, Congressional intent, and the decisions of this Court, other courts, and the Board itself in a multitude of cases have always assumed to have been preserved in the National Labor Relations Act.

C. The fact that an activity is traditional in the Labor movement does not mean that it represents an absolute right or that it is a Section 7 activity universally superior in legal status to the equally traditional right of employers, left intact by the Act, to impose normal and lawful discipline in the interests of efficient operations.

We shall argue in Points II and III *infra,* that the structure of both the original and the amended Act and the main stream of judicial construction thereunder establish a distinction between employer conduct which is anti-union in basic design and employer conduct which is oriented in terms of efficient business operations—with the former prohibited by the Act and the latter left unimpaired. However,

effective consideration of certain phases of Petitioner's brief makes it necessary to anticipate a portion of that analysis at this point.

1. The Board's Theory of Analysis of the Act, Making Every Traditional Type of Labor Union Conduct absolutely Immune to Employer Discipline, has been Rejected by the Court as Repeatedly as it has been Advanced.

Petitioner has devoted a substantial part of its brief (pp. 17-35) to a double correlation—a correlation, on the one hand, of Sections 2(3), 2(9), and 7 of the National Labor Relations Act; and, on the other, of the National Labor Relations Act as a whole and the Norris-LaGuardia Act. Stripped of all subtleties and complications, this double correlation is designed to establish one point: that all the traditional labor activities either made immune to injunctive relief by the Norris Act or referred to in the National Labor Relations Act, however generally, incidentally, or indirectly, fall within the protection of Section 7. In order to put this contention in proper perspective it is necessary to note that the Board has offered the same theory of construction to the Court, in a variety of costumes, since the earliest days of the Wagner Act. The tenacity with which the Board has advanced this theory of construction, in one form or another over the years, can be properly evaluated, however, only in the light of the consistency with which this Court has rejected the theory, in whatever form presented, over the years.

Section 2(3) of the Act provides in part that the term "employee" includes any person "whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." Section 2(9) states that the term "labor dispute" includes "any [labor] controversy . . . regard-

less of whether the disputants stand in the proximate relation of employer and employee." Toward the beginning of its analysis, the Petitioner correctly observes that these definitions merely establish the physical coverage of the Act, and that specific employee activity is immunized only if it "falls within the category of activities enumerated in Section 7." (Petitioner's brief pp. 18-19) But then in the ensuing pages of Petitioner's brief the reader is informed that subdivisions (3) and (9) of Section 2 define, not only the physical coverage of the Act, but also the scope of substantive protection afforded by Section 7. Shortly after having said that those subdivisions merely spell out the area of human action in which the National Labor Relations Act was to be operative, the Petitioner says: "The very purpose of those provisions was to protect employees who cease work in support of another labor organization in whose dispute neither they nor their employer have an immediate interest. To deny protection to such activity simply because it involves a work stoppage is to frustrate the clear will of Congress" (*Id.* p. 25; see also p. 40).

In short, Petitioner's theory seems to be that if an employee's conduct is described in Sections 2(3) and 2(9), it is made absolutely immune by Section 7 to any form of employer discipline, regardless of the circumstances in which the discipline is imposed. So, if an employee ceases work in connection with a labor dispute, under the Board's theory, that employee is immune to disciplinary action.

A variation of this theory was first presented to the Court in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), with the Board then urging that strikers who had ceased work in connection with a current labor dispute remained employees within the meaning of Section 2 (3). The undivided Court in *Mackay* provided the key

to the present case and the definitive explanation of the function of Section 2 (3). It pointed out that Section 2 (3) gives economic strikers no greater and no less—but precisely the same—status which other employees possess. In remaining employees, the Court held, strikers have exactly the same rights as employees who have not struck: that is, the right not to be coerced or discriminated against. With this feature of *Mackay* we deal in detail at pp. 58 *et seq.* For present purposes, however, we need note that *Mackay* made it clear that even complete economic strikers have no guaranteed job security merely by virtue of their retention of the abstract "employee status" defined in Section 2 (3).

The Board advanced another variation of its present theory in *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939). There, going beyond the replacement of strikers which *Mackay* involved, the employer had taken the positive step of discharging certain employees who had taken possession of a factory in connection with a strike. However, in *Fansteel*, as in *Mackay*, work had ceased in connection with a current labor dispute, and the Board insisted that under the circumstances the discharge was unlawful. This Court again rejected the Board's contention. *Fansteel* thus reaffirmed the principle that the mere ceasing of work in connection with a current labor dispute does not carry with it a guaranty of job security, and it went on to establish that the employer might even take the affirmative step of discharging employees in certain circumstances, notwithstanding the fact that they had ceased work in connection with a current labor dispute.

The Board offered its present theory in still another dress in *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939). There the contention was that the employer violated the

Act in discharging employees who had forced a shutdown in an effort to impose employment conditions at variance with those established in a collective agreement. Unlike *Fansteel,* the employee action in *Sands* did not involve egregiously unlawful conduct, if indeed it could be regarded as unlawful conduct in any sense in a day when the legal status of the collective agreement was considerably more dubious than it is today. *Cf. Sen. Rep. No. 105 on S. 1126, 80th Cong.,* 1st Sess. pages 15-18. Yet this Court affirmed the holding of the Court below, which held that the Board had erred in ruling that Section 2(3) established the discharge as unlawful. It is interesting to note in the present connection that the Court below spoke of Section 2(3) in the following terms:

> "* * * Section 152 (3), Title 29, U. S. C., provides 'The term "employee" shall include any employee * * * whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.* * *' The controversy here was a current labor dispute within the definition of Title 29, Section 152 (9). But the statute does not provide that the relationship held in *statu quo* under Title 29, Section 152 (3), shall continue in the absence of wrongful conduct on part of the employer and of rightful conduct on the part of the employees. If such were its meaning, the right of the employer to select and discharge his employees * * *, which still exists in absence of intimidation or coercion in violation of the statute, would be cut off." (C. A. 6, 1938) 96 F. 2d 721, 726.

Similar attempts by the Board to purvey its present theory, or minor variations thereof, met with similar rebuffs from the Court in *Southern Steamship Co.* v. *N. L. R. B.,* 316 U. S. 31 (1942), and more recently in *Interna-*

tional Union, U. A. W., A. F. L. v. *W. E. R. B.*, 336 U. S. 245 (1949), petition for rehearing denied, 336 U. S. 370 (1949). In each of these cases, the Court reaffirmed the principle that ceasing work in connection with a current labor dispute does not automatically establish the existence of a Section 7 activity.

Each of the foregoing cases involved genuine, concerted strike action. In each, therefore, Sections 2 (3) and 2 (9) were positively, directly and explicitly relevant. Taking these cases either individually or collectively, they establish that an activity is not necessarily entitled to the protection of Section 7 no matter how squarely it falls within Sections 2 (3) and 2 (9). Yet, in spite of this uniform course of decision by the Court, involving both the reversal of Board decisions and the rejections of arguments by the Board on appeal, the Board has once again presented the contention that the scope of Section 7's protection is necessarily geared to the activities described in Sections 2 (3) and 2 (9). In fact, the theory of construction is offered here in an even more extreme form than it has ever previously been displayed. For the Board is urging here that Sections 2 (3) and 2 (9) bring Section 7's protection, not only to the strike action with which they expressly deal, but also to all the forms of traditional labor action which might conceivably fall within the language of either those definitions or the Norris-LaGuardia Act.

Petitioner relies heavily on Section 4 of the Norris-LaGuardia Act for support of the contention that all traditional labor activities are absolutely protected by Section 7 of the National Labor Relations Act, as amended. Section 4 of the Norris-LaGuardia Act is a catalogue of the various types of labor action which, when they occur in a "labor dispute," may not be enjoined by the federal courts in a

suit brought by a private party. Among the types of conduct made thus unenjoinable by Section 4 are strikes, picketing, boycotts, and, in general, virtually every kind of non-violent labor conduct, including respect for picket lines, strikes in violation of agreements, "secondary boycotts", and so on. Waugh's conduct undoubtedly falls within Section 4 of the Norris-LaGuardia Act.

Petitioner's position is that Section 7 of the National Labor Relations Act should be read to some undefined extent as positively protecting against employer discipline all the types of activities which are made immune by the Norris-LaGuardia Act to the injunctive processes of the federal courts (Petitioner's brief, pp. 29-35, especially pp. 33-35).

As Petitioner recognizes, this cannot possibly be advanced seriously as a general proposition at the present time, when the National Labor Relations Act, as amended, has made positively unlawful certain of the activities which Section 4 of the Norris Act took from the equity jurisdiction of the federal courts. Nevertheless, Petitioner insists that activities immunized against injunctive relief by Section 4 of the Norris Act and still not made unlawful by the Taft-Hartley Act remain entitled to the total immunity afforded by Section 7 of the National Labor Relations Act. (Petitioner's brief, p. 35 *et seq.*). We deal in detail in Point IIB4, *infra*, with so much of Petitioner's present argument as is based on the proviso to Section 8 (b) (4). It is desirable at this juncture, however, to demonstrate the fundamental error in the general view that all the labor activities made immune to injunctive processes by Section 4 of the Norris Act and not positively outlawed by the Taft-Hartley Act are entitled to the complete protection of Section 7 of the latter Act.

The error becomes apparent immediately upon realization that a strike in violation of the collective agreement is made unenjoinable by the Norris Act. *Alcoa Steamship Co.* v. *McMahon* (C. A. 2, 1949), 173 F. 2d 567; *Third Avenue Transit Corp.* v. *Quill* (C. A. 2, 1951), 192 F. 2d 971. *Cf. Amazon Cotton Mills* v. *Textile Workers Union of America* (C. A. 4, 1948) 167 F. 2d 183; *International Longshoremen's Union* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119.

If the Board's current contention were sound, it would follow that an employer may not discharge employees who participate in a strike in violation of a collective agreement, since such a strike is unenjoinable under the Norris-LaGuardia Act and not declared unlawful by the Taft-Hartley Act. The law is, however, precisely to the contrary. Ever since this Court's decision in *Sands, supra,* it has been accepted that employers do not violate Sections 7 and 8 of the National Labor Relations Act in discharging employees who participate in a strike in violation of a collective agreement. In its decisions since enactment of the Taft-Hartley Act, the Board itself has followed the rule of the *Sands* case. Cf. *National Electric Products, Inc.*, 80 NLRB 995 (1948); *Stockham Pipe Fittings Co.*, 84 NLRB 629 (1949); *Granite City Steel Co.*, 87 NLRB No. 122 (1949).

It would serve no useful purpose to amass additional authority for the point that not every traditional labor activity made unenjoinable by Section 4 of the Norris-LaGuardia Act is entitled to the complete protection of Section 7 of the National Labor Relations Act. The Board has itself held that there is a species of labor conduct which may not claim the protection of Section 7, even though it does not violate the N. L. R. A. as amended. *Perry Norvell Co.*, 80 NLRB 225 (1948). But the more important point at the present moment is that there is absolutely no justifica-

tion for a correlation of the kind proposed by the Board. The Norris-LaGuardia Act and the National Labor Relations Act lack the essential identity and the common design which induced this Court, in *U. S.* v. *Hutcheson,* 312 U. S. 219 (1941), to correlate the Norris-LaGuardia Act with the Clayton Act. The Norris-LaGuardia Act and the Clayton Act both dealt with the same problem, the availability of injunctive relief in labor disputes. Their approaches, even their substantive provisions, were virtually identical. But the Wagner Act was concerned with a phase of labor relations with which the Norris Act did not even purport to deal, viz., the use by employers of their economic power to inhibit and to frustrate employee self-organization. Moreover, it must be remembered that the controlling law today is not the Wagner Act, but the Taft-Hartley Act. And it seems sound to say that the Taft-Hartley Act has even less in common with the Norris Act than the Wagner Act had.

Petitioner's effort to establish the scope of Section 7's protection by mechanical reference to Sections 2 (3) and 2 (9) of the National Labor Relations Act and to Section 4 of the Norris Act is a flight to the abstract and the technical induced by the difficulties which the hard facts of this case throw in the way of a holding that Waugh was engaged in a "concerted action for mutual aid and protection." Because it is difficult realistically to view Waugh's conduct as involving "mutual aid and protection", Petitioner is compelled to a tortuous process of strenuous construction. And the result, as this Court put it in *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 191 (1941), is "a bit of verbal logic from which the meaning of things has evaporated."

The only ground upon which the Board can straightforwardly support its contention that Respondent committed an unfair labor practice is that conduct such as Waugh's, simply because it is traditional conduct for union

men, carries with it the complete negation of the right of employers to use normal forms of discipline in pursuance of normal business objectives. Mature consideration of the statutory scheme, the relevant authorities, and the important problems of policy which this case raises will indicate that such a proposition, when fully appreciated, must be rejected.

2. Unqualified protection of respect for picket lines involves the negation of a right of employers which the Act has not only left unimpaired but has expressly confirmed.

No one can reasonably dispute the statement that refusals to cross picket lines are traditional in the labor movement in this country. Few will even dispute the assertion that in a proper case a refusal to cross a picket line may be a concerted activity for mutual aid and protection which is immune to employer discipline. Thus, in an analysis of the *Illinois Bell* case, *supra*, one writer has said that "the [Seventh Circuit's] approach does not give employers *carte blanche* to discipline or discharge employees who refuse to cross a picket line. In fact, employers receive only an extremely limited benefit from the decision." *Petro, National Labor Policy and Respect for Picket Lines*, 3 Labor L. J. 83, 87 (1952). This writer goes on then to define a number of common instances in which a refusal to cross a picket line would be immune to employer discipline —all, however, instances in which the objective of the picket line has some bearing on the rights or working conditions of the individual employee involved.[5] *Cf. N. L. R. B.* v.

[5] "In the first place, the court's approach [in the *Illinois Bell* case] would not justify a discharge where an employee in an unorganized plant respected a picket line set up by fellow workers in either an organizing drive or in an attempt to induce the employer to raise wages or to improve working conditions in the same plant. The same would probably be true even if the picket

Montag Bros. Inc. (C. A. 5, 1944) 140 F. 2d 730, where the court held that employees were privileged by Section 7 in respecting a picket line established in an effort to organize their own plant. Respect for a picket line in such circumstances does of course amount to exercise of the right of self organization, and also participation in concerted action for mutual aid and protection.

But the Petitioner is contending in this case that the right to refuse to cross a picket line at any time, at any place, and under any circumstances is an *absolute* right, absolutely privileged against, and absolutely immune to any kind of discipline by employers.

We need hardly labor to this Court the point that the absolute right is an extremely rare specimen. As recently as 1951 this Court said that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. . . ." *Lorain Journal Company* v. *U. S.*, 96 Law. Ed. 121, 128 (1951). And again, in a much closer case, involving the rights estab-

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line were maintained by 'outsiders'—that is, a union representing no existing employees.

"Again, if the employer was dealing with a union which he illegally dominated or supported, he could probably not [lawfully] discharge or discipline employees who respected a picket line set up in rebellion against the existing representatives.

"Nor, certainly, could the employer discipline employees if he had refused to bargain with their representatives, and if the picket line were set up and respected as a consequence thereof.

"Finally, there can be no doubt that employees would be completely privileged to respect a picket line set up by their representative in a bargaining impasse. This fact indicates the narrowness of the [Seventh Circuit] court's decision and of the benefits which it confers on employers, for this is of course the most common case. If the employer gains from the decision no advantage in the most common case, it is clear the decision can be neither hailed nor damned as a great victory for employers." Petro, *Ibid.* at page 87.

Compare the view of another law-review writer, who insists that *Illinois Bell* leaves "no protection at all" to employees who respect picket lines. 52 Col. L. Rev. 934, 936 (Nov. 1952).

lished in the National Labor Relations Act and in Section 7 itself: ". . . Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798 (1945).

Respondent agrees that its traditional right to use its own discretion in the selection and direction of its working force is qualified by the Act's prohibition against anti-union activities. But it insists that there are limitations to this qualification of traditional employer rights, limitations established by this Court in the very beginning, in *Jones & Laughlin*, 301 U. S. 1, 44-45 (1937):

> ". . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion."

The Board is actually seeking now to transform a narrowly limited Congressional qualification of traditional employer rights into a complete negation of those rights, while at the same time expanding a limited employee benefit into an absolute right. This is an impermissible exercise of legislative power.

The Court has more recently ruled that the scope of the rights granted by Section 7 is not to be determined by *the Board's* conceptions of labor policy, except where those conceptions are in full accord with the expressed intent of Congress. *Colgate-Palmolive-Peet Co.* v. *National Labor Rela-*

tions Board, 338 U. S. 355 (1949). In *Colgate* the Board had held that a discharge pursuant to a (then lawful) closed-shop agreement violated the Act because in the circumstances of the case it unduly impaired the right of self-organization, as that right was conceived by the Board. Holding that the Board's ruling, although merely an application of its long-standing *"Rutland Court"* doctrine, could not be allowed to cancel the plainly-expressed Congressional sanction of the closed shop, this Court said:

> "Congress knew that a closed shop would interfere with freedom of employees to organize in another union and would, if used, lead inevitably to discrimination in tenure of employment. Nevertheless, with full realization that there was a limitation by the proviso of Sec. 8 (3) upon the freedom of Sec. 7, Congress inserted the proviso of Sec. 8 (3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." (*Ibid.* at p. 363.)

In *Colgate*, the Court observed that the employer had "no record of anti-union or anti-organizational activities" (p. 357), an observation which applies as well in this case. Again, in *Colgate* the Court observed that the contract on which the discharge was based "was entered into in good faith by the parties and served as a foundation for amicable labor relations for over four years" (*Id.* at 358). Respond-

ent here has contracted with Waugh's union for more than forty years, and the discharge of Waugh was based on rights granted the employer by the then current collective agreement (see Point IV, *infra*). In *Colgate* employees were discharged pursuant to a closed shop agreement because their union had suspended or expelled them for setting up a rival organization—plainly an exercise of the right to self-organization within the literal meaning of Section 7. Here an employee was discharged, pursuant to provisions of a collective agreement expressly prohibiting interruptions of work and defiance of employer instructions, because he had refused to perform those parts of his duties which required crossing the picket line of an unrelated union—not nearly so plainly, in the circumstances of this case, an exercise of a Section 7 right. The Court in *Colgate* referred to the closed shop as "one of the oldest techniques in the art of collective bargaining" (p. 362). But it has even more recently said that "bargaining for management functions clauses is common bargaining practice." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 96 L. Ed. 723, 728 (1952). In *Colgate*, the discharge was held justified on the basis of Congress's express sanction of closed-shop agreements. But Congress has also expressly declared that a discharge for "cause" is lawful (Section 10(c) discussed in Points III and IV, *infra*), and there can be no doubt that employer rights are equal in traditional significance to the closed shop. Indeed, the existing Congressional ban on the closed shop suggests that in the eyes of Congress the traditional rights of employer are of more social significance than the closed shop.

Colgate does not bind the Court to rejection of the Petitioner's position here, but its whole weight is thrust in that direction.

Respondent in this case is not even *charged* with having intimidated or coerced Waugh "with respect to self-organization and representation," to use the key words in the quotation from *Jones & Laughlin, supra.* Therefore, in holding the discharge an unfair practice, the Board has ruled in effect and now contends that conduct such as Waugh's is *absolutely* privileged. The Board apparently operates on the theory, at times, that every kind of lawful assistance extended among union members, regardless of the nature of the assistance or the circumstances involved, constitutes concerted action for mutual aid and protection within Section 7. For example, it has recently held that a consumer boycott (one of the activities made immune to injunctive relief by Section 4 of the Norris-La Guardia Act) is in all circumstances a Section 7 activity. *Hoover & Co.,* 90 NLRB 1614 (1950). In reviewing that holding, however, the Court of Appeals for the Sixth Circuit reversed the Board, criticizing its extreme conception of the scope of Section 7. 191 F. 2d 380. Previously a legal scholar who can scarcely be described as unsympathetic with the Board characterized the conception of Section 7 advanced by the Board in *Hoover* as unthinkable. *Cox, The Right to Engage in Concerted Activities,* 26 Ind. L. J. 319, 338, 346 (1951).

We of course do not contend that an individual refusal to cross a picket line is positively unlawful; the proviso to Section 8 (b) (4) of the Act clearly states the contrary (*infra,* pp. 62-63). We aver merely that a refusal *of the kind involved in this case* may not properly be viewed as a concerted activity for "mutual aid and protection" within the meaning of Section 7; that Waugh's individual action was based on personal interest and conviction having no bearing on "self-organization and representation" (*Jones & Laughlin, supra*); and that such action, expressing indi-

vidual sentiment, is no more entitled to the status of "concerted activity for mutual aid and protection" than was the venting of individual spleen in the *Joanna Cotton Mills* case, *supra*. However understandable Waugh's reluctance to be called a "scab" may be, it did not make his conduct "concerted action for mutual aid and protection." The Board's attempt to bring Waugh's conduct within the scope of Section 7 is an attempt to make every refusal to cross a picket line the exercise of an absolute right, not only absolutely lawful, but also absolutely immune to the exercise of the lawful right of employers to discipline or discharge employees for other than anti-union reasons.[5a]

This pushes a reasonable and desirable right too far. There are dangers as well as positive values in the concept of "labor solidarity". Not only all workers, in fact all members of society, have substantial mutual interests. It is as true in law as it is in life itself that no man is an island unto himself, that all are part of the main. Indeed, the profound significance of this concept provides the indispensable element in preserving to employers some reasonable scope for the orderly and efficient conduct of the nation's industry, in which every member of the nation has so immediate and direct an interest. So Congress must have felt in expressly preserving the right of employers to discharge for "cause". (Points III and IV, *infra*.)

[5a] The Board contends that Waugh's action is privileged because it gave *some* assistance to the Typographical Union and that it is not for the Board or the Courts to determine the degree of assistance which employees, in the exercise of their own discretion, determine to give. (Board's brief, pp. 23-24.) At the same time, the Board assumes that it has the power to limit the discretion of employers who have decided that discharge is the suitable discipline for an employee whose persistent insubordination materially embarrasses important business operations. *(Ibid.;* p. 46 *et seq.)* There is no justification in the Act or in the national policy for this ranking of employer and employee discretion. Furthermore, as we show in Point IIB3, *infra*, the Board's attempt to compel treatment of Waugh as an economic striker will not bear analysis for other reasons.

With picket lines a common phenomenon in American life, with American industry as integrated as it is, and with unionization so extensive and even, in some areas, universal as it is, the lack of wisdom in holding every refusal to cross a picket line an absolutely protected activity becomes apparent. Every strike in heavily unionized areas such as New York, the scene of this case, might become in more or less degree a general strike.[6]

Reversal of the Second Circuit in this case would undoubtedly encourage a trend toward widening the effects of labor disputes; knowledge that this Court has ruled employers powerless to defend themselves against refusals to cross picket lines will undoubtedly strengthen an already partly institutionalized practice;[6a] and thus the practice, with its undesirable social product, will spread. On the other hand, affirmance of the decision below will in no sense impair the rights which Congress was so plainly intent upon establishing in Section 7—the rights of self-organization, to collective bargaining, and to take other concerted activity for mutual aid and protection. No man's right to join a union, to participate in collective bargaining, or to take concerted action for mutual aid and protection, properly conceived, will be impaired by a holding that Waugh's conduct did not involve Section 7 activity at all. Indeed, union workers themselves may be thankful for having been substantially relieved of the implicit obligation to respect

[6] The dangers were evident to the far-seeing New York Court of Appeals as early as 1919. While pioneering in the struggle for establishment of basic labor rights, see *Bossert* v. *Dhuy*, 221 N. Y. 342 (1917), that court held sympathy strike action unlawful and enjoinable. *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1 (1919).

[6a] The New York *Times* of January 1, 1953, reports a threatened strike by certain longshoremen (scalers, dock weighers, and sugar samplers) which will immobilize the ports of New York, Boston, Philadelphia, and Baltimore. "Since the entire membership of the locals involved is only 600, the group would be unable to place more than one or two pickets at any pier." (*Id.*, p. 1.)

the picket lines of unrelated unions in whose objectives they have no real interest.

The words which Congress used in Section 7 do not naturally and straightforwardly yield to a construction which would make every refusal to cross a picket line a Section 7 activity; certainly they do not *necessitate* such a construction. This Court should not permit the Board to add to the Act concepts, rights, and doctrinaire extremes which Congress did not itself advance, and which are denied by the uniform course of authoritative construction.

However, even if this Court should conclude that it is possible and desirable to view a refusal such as Waugh's literally as a concerted activity for mutual aid and protection, as the Court below assumed *arguendo*, there is abundant authority and cogent reasoning in support of the proposition that the conduct *sub judice* is not the type of concerted activity which is entitled to the protection of Sections 7 and 8 (a)(1) against employer discipline exercised in the interests of normal, reasonable business operations.

II.

An employer does not violate Section 8(a)(1) where for lawful business reasons he discharges an employee who refuses to perform normal duties which would involve the crossing of a picket line of an unrelated union, since a refusal to cross such a picket line is not a concerted activity protected by the Act.

Summary.

The Board is accustomed to stating the issue in this case as if it were simply whether or not a refusal to cross a picket line is a concerted activity for mutual aid and pro-

tection within the meaning of Section 7. Sometimes it has stated the question as if it were, whether an employer violates the Act in discharging an employee *for* refusing to cross a picket line. (Petitioner's brief, Question Presented, p. 20.) Neither formulation grossly misrepresents the case. Yet both are subtle, if unintentional, distortions of the true underlying issue posed by the case. Speaking precisely, one cannot say, as the Board has continually said, that Respondent discharged Waugh *for* refusing to cross a picket line. To be accurate, Respondent discharged Waugh because Waugh chose not to perform all the duties which he implicitly and his union explicitly had agreed that he would perform as a condition of receiving the wages set forth in the collective agreement. Thus brought into better focus, the basic problem is whether Waugh's refusal to abide by the terms of his employment arrangement was specially privileged. And, assuming *arguendo* that Waugh's refusal to cross the picket line may accurately be viewed as a concerted activity within the *literal* meaning of Section 7, the issue narrowly stated becomes: is such a refusal the kind of concerted activity which the Court should hold always immune to employer discipline, even where such discipline is exerted solely in pursuance of normal business operations and in accordance with the conception, mutually held by the parties involved, of the employer-employee relationship?

One phase of the history of societies may be described in terms of the quest for methods of regulating in the general interest the techniques of action available to persons or groups acting in pursuit of their own immediate interests. Some nations have sought to minimize the harmful capacity of private groups or individuals by virtually destroying private power, by vesting all or nearly all power in government. Others, for a time at any rate, have relied

upon laisser faire. This country has chosen a more complicated way. In this country, two of the classic methods of control have been governmental regulation and private checks and balances. In the field of industry and commerce we have a comprehensive system of regulation; but we rely heavily at the same time on the powerful pressures of private competition to prevent social abuses by the business community. In labor relations likewise we have a scheme of legal control of employer and union conduct; but there too we rely heavily for moderation of the excesses of worker, union, and employer upon the checks and balances which the position and natural instincts of each impose upon the others.

The extent to which workers and their unions are to be permitted to take action in their own interest has posed one of the most enduring problems in labor law. This country's approach has been to establish three categories for concerted employee action: (1) a category of absolutely unlawful acts; (2) a category of absolutely privileged acts; and (3) a category of acts which, neither absolutely privileged nor absolutely outlawed, are left for approval or disapproval to the free play of economic and social forces. A refusal to cross a picket line of an unrelated union—the activity in issue in this case—falls into the third category. It is neither unlawful nor absolutely privileged. The person who engages in it does so at his own risk.

A refusal to cross a picket line—*in the circumstances of this case*—falls into the third category, and not into the second, because it is identical to those classes of employee activity which Congress characterized as "improper". Calling an activity "improper" was Congress's method of identifying employee activity to which it intended to deny the protection of Section 7 and Section 8(a)(1) without

declaring it positively unlawful. It was the method by which Congress distinguished between activities which belong in the first and second categories mentioned above, and activities which belong in the third category. This Court, the Courts of Appeals, and the Board itself have all operated consistently within the framework of those categories. In fact, two Courts of Appeals have already ruled that the activity in issue in this case falls naturally within the third category, while this Court and the Board have expressed themselves, in analogous cases, in a manner which places Waugh's conduct in that category—the category of activities not entitled to absolute immunity. Accordingly, when the employer discharged Waugh, for lawful reasons associated not at all with anti-union considerations, the discharge could not be characterized as interference with or restraint or coercion of the exercise of a right absolutely protected by Section 7.

A. The protection of Section 7 does not extend to either unlawful or improper activities, but is confined to straightforward organizational and strike action.

1. Construction of Section 7 Prior to Amendment of the Act in 1947.

Ever since this Court overruled the Board in the famous *Fansteel* case it has been established that not every activity literally described by the words "concerted action for mutual aid and protection" is protected by the Act against employer discharge or other discipline. (*N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939)). The *Fansteel* case involved a plainly unlawful act on the part of the employees who were discharged, i.e., a sitdown strike. The decision was a seminal one, however. On the basis of *Fansteel*, this Court, the Courts of Appeals, and the Board

itself in cases decided under the original National Labor Relations Act, fashioned the principle that Section 7 affords no protection, not only to unlawful acts, but to activities inconsistent with national labor policies and to other improper activities. Thus, in *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1942), this Court, again reversing the Board, held that a strike amounting to the crime of mutiny was not a protected concerted activity and admonished the Board that it was not to forget that its view of the national labor policy had to be integrated with other important national policies, not allowed to engulf them. In *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939), this Court found it necessary still again to restrain the Board's ardent efforts to inflate the meaning of Section 7 to the point where all other laws and all other social policies would exist only by sufferance. There the Court ruled that a strike in repudiation of a collective agreement was not a concerted activity entitled to the protection of Section 7. In so ruling the Court made a statement which is of extreme significance for the present case. It said: "* * * the Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (*Id.* at p. 344.) Waugh's refusal to enter the *Star* plant was a clear violation of the terms of his implicit contract of employment as well as of the collective agreement executed and signed by Waugh's union and the Respondent. In *Sands, supra,* this Court rejected the argument that a strike, being necessarily a concerted action for mutual aid and protection, privileged the repudiation of the agreement. It is difficult to see how a refusal to cross a picket line, in the circumstances of this case, can be held to privilege a similar repudiation. Certainly such a refusal is less clearly

a "concerted action" than a strike is, and therefore less entitled to the protection of Section 7.

But the line of authority begun in *Fansteel* did not end with the denial of Section 7's protection to the foregoing types of activities alone. While still operating under the Wagner Act, the courts and the Board significantly extended *Fansteel's* theory to employee activities which were scarcely unlawful in the normal sense. In *NLRB* v. *G. G. Conn, Ltd.* (C. A. 7, 1939) 108 F. 2d 390, the court held that an employer did not violate the Act in discharging a group of workers who had decided to work only according to their own conception of proper hours, refusing to work in accordance with the employer's instructions. Where another group of employees decided, contrary to their employer's instructions, to refuse to work upon goods routed to them from one of the employer's strike-bound plants, while continuing to do other parts of their work and drawing their regular pay, the employer was again held to have violated no part of the Act in discharging them after giving them the choice —as Respondent gave Waugh his choice in the present case—either to perform all work assigned or be dropped from employment. *NLRB* v. *Montgomery Ward & Co.*, (C. A. 8, 1946) 157 F. 2d 486. The decision by the Fourth Circuit in *Home Beneficial Life Insurance Co.* v. *NLRB*, 159 F. 2d 280 (1947), is an extremely significant one in the present connection. There, during a strike by a majority of employer's insurance salesmen, a minority continued to perform certain parts of their regular duties, but refused to report to work in accordance with the employer's instructions. The employer discharged the minority for refusal to comply with all instructions. This discharge, the Board held, was an unfair practice. The minority were engaged in a concerted activity protected by the Act—a partial strike

—according to the Board. But the Fourth Circuit reversed, referring to the Board's conclusions as follows:

> "It seems clear to us that these conclusions cannot be sustained. Insofar as they deny the right of the company to discharge for concerted disobedience to its rule, they are in conflict with established doctrine, as we have shown. . . . The men who did not strike on October 13, but continued to work without reporting in the morning as required by the rule were discharged and ceased to be employees on that date. Although they subsequently associated themselves with the strikers, they did not thereby improve their position or gain the right of strikers to reinstatement." (*Ibid.* at p. 286)

It would scarcely seem possible to get a case closer to the present one than *Home Beneficial* or *Montgomery Ward,* although *Sands* and *Conn, supra,* seem also very much in point.

Shortly before the National Labor Relations Act was amended by Congress, the Board itself began to hold that some genuinely concerted activities for mutual aid and protection are not privileged by Section 7 against employer discipline. So, in *American News Co., Inc.,* 55 NLRB 1302 (1944) the Board held that a strike to compel an increase in wages before approval thereof by the Wage Stabilization Board was an unprotected concerted activity. Again, in *Thompson Products, Inc.*; 72 NLRB 886 (1947), the Board held that a strike for recognition by one union at a time when another union had been certified as exclusive bargaining representative was an unprotected concerted activity. Meanwhile, in a closely related series of cases, various courts of appeals had been holding that minority or "wildcat" strikes were, with some exceptions, usually unprotected concerted activities. See, for examples, *N. L. R. B.*

v. *Brashear Freight Lines, Inc.*, (C. A. 8, 1941) 119 F. 2d 379; *N. L. R. B.* v. *Draper Corp.*, (C. A. 4, 1944) 145 F. 2d 199; *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, (C. A. 4, 1942) 127 F. 2d 109; *N. L. R. B.* v. *Indiana Desk Co.*, (C. A. 7, 1945) 149 F. 2d 987; *Western Cartridge Co.* v. *N. L. R. B.*, (C. A. 7, 1943) 139 F. 2d 855.

Before the National Labor Relations Act was amended in 1947 the Board also held that a strike in violation of a no-strike agreement, while not positively unlawful, was nevertheless an unprotected activity. *Scullin Steel Co.*, 65 NLRB 1294 (1946).

Such, in brief, was the status of authority concerning the scope of protection afforded by Section 7 when the Congress reconsidered the National Labor Relations Act in 1947.

2. Congressional Intent in Regard to the Scope of Protection Afforded by Section 7 of the Amended Act.

The Board has pointed out (petitioner's brief pp. 43-45) that when Congress in 1947 added to Section 7 a guarantee to employees of the right to *refuse* to engage in concerted activities, the additional guarantee was intended to protect against union coercion individual employees who chose to go to work even when that might involve crossing a picket line. As to that, no one familiar with the background of the Taft-Hartley Act can possibly disagree. But then the Board goes on to argue that this grant of protection *proves* that Congress intended to extend equal protection to the right "to respect a picket line." "Manifestly," the Board says, "the right to cross a picket line is protected only if it is the converse of an already protected affirmative right, *i.e.*, to respect a picket line." (Petitioner's brief p. 15; *cf.*, *ibid.* at p. 43.)

This is again an example of the Board's tendency to extreme over-simplification, and of its failure to deal adequately with the statute of which it is the primary guardian and administrator.

Congress definitely intended to protect against union restraint or coercion workers who decide to abstain from strikes or who decide to cross picket lines. That is the only conclusion which can be drawn from Section 8(b)(1)(A), which provides that it shall be an unfair practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ." What the Board has neglected to point out to this Court, however, is the fact that Section 8(b)(1)(A) goes on to provide "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." And the Board has also neglected to inform the Court of its holdings in the cases involving the Typographer's Union, *American Newspaper Publisher's Association* v. *N.L.R.B.* (C. A. 7, 1951) 193 F. 2d 782 enf'g 86 N.L.R.B. 951, 86 N.L.R.B. 1041, and 87 N.L.R.B. 1418. In those cases the Board held that the union did not violate the Act in threatening with expulsion a member who demurred to participation in the unlawful activities of the union.

The significance of these omissions by the Board lies in the fact that the speciousness of its logic is hidden so long as the neglected statutory provision and cases are left unmentioned. The fact which the neglected provision and cases make plain is that Congress did not mean to render entirely immune to union discipline a refusal to participate in picketing activity, any more than it meant to make entirely immune to employer discipline the converse respecting of a picket line. A union man may decide to cross his own union's picket line, and be entitled to relief at

common law and under the Act if his union should inflict physical harm upon him for such conduct; but he is entitled to no relief under the plain words of the statute and under the Board's interpretation of those words if the union expels him from membership for refusing to participate in the strike or the picketing.

Respondent does not, on the other hand, however appealing the reverse of the Board's logic may seem at first blush, assert that the considerations just sketched necessarily "prove" that Congress meant to permit an employer to impose discipline on the respecter of the picket line. For one thing, Respondent urges here, as it has urged before, that its right to discipline an employee for refusing to cross a picket line varies with the circumstances, that the previously cited analysis sketching situations in which such discipline would violate the Act, is entirely sound. In the second place, and more important, it seems plain that Congress did not intend, in granting the right to *refuse* to engage in concerted activities, to restrict or in any way to affect the employer's scope of action in disciplining employees who engage in concerted activities.

One of the clearest expressions of Congressional intent in regard to the 1947 amendments of the Act, in fact, is the one relating to Section 7, to be found in *House Conference Report* No. 510 on H. R. 3020, 80th Cong. 1st Sess. 38-40. An extensive excerpt from this Report is reproduced in the Appendix to this brief (p. i).

It must be remembered here that as of 1947 the courts and the Board had developed the theory that *true concerted activity* was unprotected by the Act, not only where the activity was unlawful in itself (*Fansteel, supra; Southern Steamship, supra*), but also where it was "improper" in the sense of repudiation of either a collective agreement (*Sands, supra*) or the implicit terms of employment (*Conn.*

Montgomery-Ward, Home-Beneficial Life Insurance Co., supra). Furthermore the Board had at that time given promise of acquiescence in these judicial developments (*American News, Thompson Products, Scullin, supra*). Perusal of the Conference Report cited above will show that Congress was vividly aware of these developments. Yet, in spite of this complete awareness, Congress chose not to make any change in the wording of Section 7 which would increase the scope of protection afforded employees against employer discipline. In these circumstances it seems perfectly plain that Congress did not disapprove of the developing circumscription of protected action herein noted. But there is no necessity of relying upon inference here as to Congressional intent. The drafters of the Report expressly said that they approved of the developments in the Courts and the Board. Much more than that, the drafters went on to say that they declined to embody their approval in the written words of the statute only because they feared that to do so might inhibit the trend toward developing the area of unprotected action:

> "... there was real concern that the inclusion of ... a provision [excluding certain activities from the protection of Section 7] might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act" (Ibid. p. 39).

If Congress were satisfied with the extent to which protected concerted action had thus far been defined by the Courts, it would have been relatively easy for it either to list the forms of concerted action which had already been held unprotected, or, as it did in Section 13 of the Act, express approval of the then existing limitations which had been placed on Section 7. Instead it chose to leave the

relevant statutory language unchanged, while at the same time saying unmistakably in the Conference Report that the existing trend in the Board and the Courts had Congressional approval, and should be continued.

It is not surprising, in these circumstances, that the Courts have continued under the Taft-Hartley Act the trend begun under the Wagner Act of careful definition of the types of concerted action entitled to the positive and absolute protection of the National Labor Relations Act, as amended.

3. Construction of Section 7 since 1947.

Circumscription of the scope of protection afforded by Section 7 has proceeded on all levels since 1947. This Court, the Court of Appeals, and the Board itself, since 1947 have all handed down decisions adding to the pre-1947 list of unprotected concerted activities.

The most significant decision since 1947 bearing on the scope of Section 7, although not as close factually to the present case as some of the others, was the decision of this Court in the "Briggs-Stratton" case, *International Union, UAW-AF of L* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, petition for rehearing denied, 336 U. S. 970 (1949). The issue in that case was not whether an employer violated the Act in disciplining employees who had engaged in concerted activities. Instead, the question was whether Section 7's guarantee of the right to engage in concerted activities was infringed by a Wisconsin statute which had been construed by the Wisconsin courts as outlawing intermittent strike action, carried on a short part of each day for some twenty-six days. Clearly the strike action was concerted action for mutual aid and protection, within the *literal words* of Section 7. Nevertheless, a

majority of this Court held that it was not *protected* concerted activity. Therefore, the Court concluded, the Wisconsin statute did not run afoul of the Federal Act, and could stand.

The bare holding of *Briggs-Stratton* is in itself distinctly important in the present litigation, establishing as it does that Section 7 does not protect against state regulation a genuinely concerted activity which is lawful under the National Labor Relations Act. Holding that much, it must also hold that an employer may discharge "installment-plan" strikers without violating the Act even in states which, unlike Wisconsin, do not positively outlaw such eccentric strike action. It necessarily means that "partial" strikers are not protected by the Act against employer discharges or other forms of discipline. It cannot mean that an activity is unprotected so far as state regulation is concerned but protected so far as employer discipline is concerned. Nothing in the Act suggests such a double standard of measurement of the scope of Section 7's protection.

But the importance of *Briggs-Stratton* to the present litigation does not stop there. The majority opinion goes on to propose, for the first time, a generalization concerning the meaning and scope of Section 7—a generalization which can go far toward resolving and clarifying the vexing problems which have studded its history. The Court said, in *Briggs-Stratton*:

> "In the light of labor movement history, the purpose of . . . [Section 7] becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 . . . took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state,

as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." (*Id.*, pp. 257-8.)

This Court is thus committed to a view of Section 7 at odds with that of the Petitioner. Whereas the Board would hold, if some of its decisions and its arguments here are to be credited, that virtually every activity engaged in by a union man or union men in connection with "traditional union action" affords protection against the imposition of discipline for violation of normal working rules, this Court has declared that while Section 7 provides a staunch bulwark against reversion to "criminal conspiracy" days, it does not give unions and their members a general privilege to subordinate to their own ends and interests the public interest in efficient conduct of business. This view of the Court seems so relevant in the present case that we cannot but specifically commend it to the Court's attention here. The *Briggs-Stratton* case establishes clean-cut organizational techniques and straightforward, lawful strike action as beyond the reach of the employer's discipline or of state prohibition. At the same time it establishes that not all activities by working men or their unions are protected concerted activities merely because they occur in the context of the employer-employee relationship. Put another way, *Briggs-Stratton* affirms immunity for the lawful activities centrally essential to the union movement—the rights to organize, to bargain collectively, and to withhold services in concert for purposes of mutual aid and protection; but it denies positive protection to peripheral, non-essential activities, however "tradi-

tional" in the labor movement they may be. And where it is doubtful that the activity in question is basically concerned at all with collective action or mutual aid and protection—as is the case in regard to Waugh's refusal to cross the Typographers' picket line—it seems clear that the theory of *Briggs-Stratton* requires denial of the protection of Section 7.

Other significant cases in point decided since 1947 come much closer factually to the instant case. In an almost identical case, the Seventh Circuit has held that a refusal to cross a picket line is either not a concerted activity at all or at any rate not a protected concerted activity. *NLRB* v. *Illinois Bell Telephone Company,* 189 F. 2d 124, cert. den. 342 U. S. 885 (1951). With the latter conclusion the Court below in the present case agreed. Meanwhile the Board itself has very recently handed down decisions which reveal it far more in agreement with Respondent than its presence and argument here would suggest. In these decisions, which we shall consider in detail in the next point of this brief (IIB.5), the Board has held that a slowdown is an "indefensible" and therefore an unprotected concerted activity (*Elk Lumber Company,* 91 N. L. R. B. 333), so indefensible, in fact, that an employer may not only discharge participants therein but even refuse to bargain with the responsible union during the period of the slowdown (*Phelps Dodge Copper Products Corp.,* 101 N. L. R. B. No. 103; (November, 1952)), and that an employer may discharge an employee who—as a union official—persisted in prosecuting employee grievances in violation of shop rules promulgated by the employer. *Crucible Steel Castings Co.,* 101 N. L. R. B. 105 (November, 1952).

The authorities which have been discussed to this point make it clear:

1. That despite the generality of its language, Section 7 does not absolutely privilege even all activities which are genuinely concerted and genuinely for mutual aid and protection;

2. That activities may fall short of the protection of Section 7 even though they are perfectly lawful in and of themselves;

3. That Congress intended to deny and that this Court, other Courts, and the Board itself have acquiesced in the denial of the protection of Section 7 to "improper" concerted activities;

4. That the protection of Section 7 may reasonably and practicably be restricted to the basic rights of self-organization, collective bargaining, and straightforward lawful strike action for genuinely mutual aid and protection.

B. Such a refusal to cross a picket line as is involved in this case, while not in itself unlawful, falls naturally within the category of unprotected concerted activity.

The Court below, Clark, J. dissenting, held that Waugh's refusal to cross the Typographers' picket line was not the type of conduct which Section 7 protects against employer discipline, where such discipline is imposed, not for anti-union purposes, but for strictly business reasons. In so holding, the Court relied mainly on such cases as *Conn* and *Montgomery Ward, supra,* which hold that unilateral dictation of employment terms and conditions by employees is not immune to employer reprisal even though the dictation is expressed in the form of conduct which may be described

literally as "concerted action." The Court relied to some extent also on a line of cases, culminating in this Court's decision in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1944), which established that an employer may limit the exercise of the right of self-organization on company premises, except in extraordinary circumstances, to non-working time. The Court below reasoned that since the right of self-organization and the right to take concerted action are stated as equal and coordinate rights in Section 7 they are subject to substantially similar qualification. Hence, the Court ruled, Waugh's right to take concerted action should protect his refusal to cross a picket line only where exercised on his own time, not at the expense of his employer. Judge Clark dissented largely on the basis of his conclusion that since Congress had expressly disavowed any intent to make an individual refusal to cross a picket line positively unlawful, it must have intended to make it unlawful for an employer in any circumstances to discipline an employee who respected a picket line.

Petitioner challenges each step in the reasoning of the court below, asserts that the holding below conflicts in principle with decisions of this Court, and urges the soundness of the conclusion as well as the reasoning of the dissenting judge.

1. The decision of the court below does not conflict, "in principle" or otherwise, with decisions of this Court.

The sole support cited for Petitioner's contention that the decision below "conflicts in principle with decisions of this Court" (petition, p. 11) is a statement by this Court in *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675, 687 (1950). As edited by the Petitioner (petition, *ibid.*), this statement both expresses recognition by the

Court that pickets seek "to influence . . . employees of [customers] of the [picketed employer] not to cross the picket line", and declares that "such conduct [by the pickets] was no more than was traditional and permissible in a primary strike". But it is impossible to see how the decision of the Court below conflicts in principle with the foregoing expression in the *Denver* case. The Court below has not said that the *Typographers* committed an unfair practice, or even that they engaged in an unprotected concerted activity; and it was the union in the position of the *Typographers* to which the Court had reference in the language quoted above from the *Denver* case, when it said that primary picketing is traditional and permissible. In its effort to create a conflict between this Court and the court below, the Board has engaged in an unjustified extension of this Court's meaning. The Board has attributed to this Court the untenable contention that since unions do not always commit an *unlawful* act when they set up the typical peaceful picket line, it must follow that employees who respect such a picket line are engaging in an *absolutely privileged* act.

The Board apparently reasons that since both primary picketing and respect for picket lines are traditional in the labor movement, the latter must be comprehensively privileged if the former is lawful.

Given a moment's reflection, this proposition and the reasoning behind it seem to have little more than assertion to commend them. The Board is actually saying that since Congress did not make it unlawful for unions to picket, it must have intended every picket line to be completely effective; and since the effectiveness of picket lines is diminished where other workers are not completely immune to discipline by their employers, Congress must have intended

to grant such immunity. But this is a roundabout way for Congress to work. If it were so preoccupied with insuring the success of every strike and picket line, it would have been much simpler and more effective to have granted immunity directly to the strikers and picketers, to have given the strikers and picketers the job security and the subsidy that the Board now seeks for some of those to whom picket lines are addressed. But this Court has held that Congress did not so intend to subsidize strikers; economic strikers take a real risk of losing their jobs. *N. L. R. B.* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333 (1937).

Again, if Congress were so single-mindedly concerned with insuring the success of strikes and picketing, why should it positively state, as it did in Section 7, that employees have a right to refuse to engage in concerted activities? The Board says in its petition (p. 12): "We submit that the legislative history does not sustain a congressional purpose to protect primary picketing and yet in effect to destroy its potency by withholding protection from employees who heed its appeal." Respondent's observation here is that a good deal may be learned about Congressional intent on the point in issue by reading the statute itself, especially in the light of the existing precedents in 1947.

Finally, in its attempt to fabricate a conflict between the court below and this Court, Petitioner reveals its basic lack of understanding of the attitude of this Court toward such "traditional primary action" as peaceful picketing. In 1950 the Court handed down three decisions which held in sum that the states are free to prohibit peaceful primary picketing where the objectives of such picketing conflict with important state policy. *Hughes* v. *Superior Court of California*, 339 U. S. 460 (1949); *International Brotherhood*

of Teamsters v. *Hanke*, 339 U. S. 470 (1949); *Building Service Employees* v. *Gazzam*, 339 U. S. 533 (1949). Petitioner's view is that if Congress has failed to outlaw "traditional primary picketing" it must necessarily follow that respect for such picketing is absolutely immune to employer discipline. In its brief (p. 39), Petitioner makes the startling statement that "to hold that employees who refuse to cross primary picket lines are not protected is to hold that permitting inducement has precisely the same effect as prohibiting it." It must amaze Petitioner to discover that this Court has held the states free to prohibit the inducement itself, notwithstanding the failure of Congress to do so.

Under the type of logic repeatedly utilized by the Petitioner, a Congressional refusal to prohibit a certain species of conduct necessarily involves a Congressional intention absolutely to immunize and to encourage that conduct and all related conduct. Thus the will of Congress is frustrated, according to Petitioner, each time a person fails to perform an act which Congress has not outlawed; and indeed it becomes positively unlawful for a person to take any action, however lawful in itself, which discourages conduct in others that Congress has failed to prohibit. To state such propositions is to refute them.

2. The Court below Correctly Correlated the Right to Engage in Concerted Activities and the Right to Self-organization.

Petitioner attacks the correlation by the court below of the right to refuse to cross a picket line with the right to engage in organizing activities, with both being limited to the free time of the employee involved. According to Petitioner, the court below "misconstrued and misapplied the decision of this Court in *Republic Aviation Corporation* v. *N. L. R. B.*, 324 U. S. 793," in making this correlation

(Petition p. 15; Brief, p. 47). We shall soon see who has "misconstrued and misapplied" *Republic Aviation.*

Petitioner contends that the correlation made by the court below is in error because exercise of the right of self-organization retains reasonable scope even though limited to nonworking time, while "the right" to refuse to cross a picket line is virtually meaningless if restricted, as the court below would restrict it, to exercise only during free time. The clear thrust of this contention is that if in *Republic Aviation* this Court had felt that exercise of the right of self-organization were "unduly impaired" by restricting solicitation of union membership on company premises to nonworking time, it would have held that employees have an absolutely protected right to engage in organizing activities during working time. More than that, Petitioner's position on this point implies that the choice before this Court *in Republic Aviation* lay between permitting solicitation during working hours and restricting it to nonworking hours, always on company premises. Of course nothing could be further from the truth. The central issue in *Republic Aviation* was whether an employer need permit *any* organizational activity on company premises; there was no question of his right to prohibit solicitation during working hours. And it is absurd to insinuate, as Petitioner has, that this Court would have required an employer to permit organizational activity during working time had it thought that a restriction to nonworking hours would "unduly impair" the efficacy of organizational activity.

Exposed to these considerations, the Board's attack on the correlation made by the court below expires; and the correlation emerges as a sound and sensible application of *Republic Aviation.* Restricting the protection of Section 7

to respect for picket lines in the circumstances of this case only during the free time of employees certainly will have a tendency to hamper the effectiveness of some picketing. But it is impossible to assert seriously that the limitation of organizational activity to non-working time does not have a similar tendency.

The Board's error lies in the assumption that no feature of the Act must ever be construed disadvantageously to the labor movement, regardless of whatever other valuable social interests may be trampled in the process. Cf. *N. L. R. B.* v. *American National Insurance Co.*, 343 U. S. 395 (1952). The fact is that an employer has never been required in the name of Section 7 to subordinate essential features of the productive process to the right of employees to take concerted action. The Board merely errs in citing the strike as an example of that kind (Petition p. 16; brief pp. 51 *et seq.*). No employer to date has been ordered to pay workers for the time they have spent on strike. Even in the case of unfair labor practice strikers, who have been held to be unconditionally entitled to reinstatement, the rule is that they do not receive back pay for the period of the strike. For a collection of cases in point, see *2 C. C. H. Lab. L. Rep. (4th Ed.)* Par. 4765.60, *et seq.* The fact that workers normally strike during working hours (Petition p. 16) is simply irrelevant to the present issue. If they strike and remain on the job, they are certainly not engaging in a protected concerted activity. *Fansteel, supra.* If they strike and leave the plant, it is improper to speak of their action as a violation of working rules, unless there is a no-strike agreement, in which case they are likewise not engaging in a protected concerted activity. *Sands, supra.*

3. The Court Below Correctly Distinguished Between "Partial" Strikes and Complete Strikes in Holding the Former Unprotected.

The Board's argument in support of the contention that the Court below erred in holding Waugh's action unprotected as a kind of "partial strike" (Petition, pp. 20-22; Brief, pp. 57 *et seq.*), while exceedingly difficult to unravel, seems to involve two main points: (1) that Waugh's conduct was in fact not a "partial strike" within the meaning of *Conn* and *Montgomery Ward, supra*; and (2) that "partial strikes" are entitled to the same status under the Act as complete (lawful) strikes. The whole line or argument is at odds with decisions of this Court and of the Courts of Appeals.

Waugh's refusal to cross a picket line is properly viewed as a partial strike. As the Court below put it, Waugh was attempting to remain at work, draw his full pay, and at the same time determine on a strictly unilateral basis, despite Respondent's firm position to the contrary, just which duties he should perform and which he should not. These are precisely the elements which in *Conn* and *Montgomery Ward* impelled the Courts to deny the protection of the Act. The Board ostensibly seeks to distinguish these cases on the ground that Waugh's objective was somehow more privileged than those of the employees involved in *Conn* and *Montgomery Ward*. Such is the burden of its accusation (Petition, p. 20; Brief, pp. 57 *et seq.*) to the effect that the holding below "is based upon a misconception of the objective which underlies employee refusals to cross picket lines." Actually Waugh's objective, or motivation, or sentiment was *identical* to the objective of the "partial strikers" in *Montgomery Ward*. The employees there, it will be remembered, refused to work on orders which had been routed to their plant from one of the employer's strike-bound plants; thus they, like Waugh, were manifesting "labor solidarity". In *Conn*,

the "partial strikers" took action in their own immediate interest, for their own immediate benefit; they refused to work more than the hours they chose to work. How the Board can seriously argue that Waugh's objective makes his action entitled to the protection of the Act, and at the same time disavow any intention to challenge the authority of *Conn* and *Montgomery Ward*, is impossible to understand; for Waugh's objective was far less concerned with "mutual aid and protection" than that of the employees in *Conn* or even *Montgomery Ward* (where their own employer was involved in the dispute). The truth is, of course, that Petitioner is asking this Court to reject both *Conn* and *Montgomery Ward*.

Much more than that, Petitioner is asking the Court to reverse its own decision in *Briggs-Stratton*, 336 U. S. 245, despite the fact that the Court refused to reconsider that decision when the Board asked for a rehearing shortly after it was handed down, 336 U. S. 970 (1949). The Board's challenge of *Briggs-Stratton* is implicit in its insistence that "partial" strikers are entitled to the same treatment as complete strikers (Petition, p. 22; Brief, pp. 61 *et seq.*); it is implicit in its approving citation (*id.*) of the Third Circuit's *N.L.R.B.* v. *Kennametal*, 182 F. 2d 817 (1950), a case which holds that partial strikers are engaged in a protected concerted activity. This Court's decision in *Briggs-Stratton* will become anomalous if the Petitioner and the Third Circuit are now held correct in identifying partial strikes with complete, straightforward, lawful strikes. For *Briggs-Stratton* refused to invalidate a state statute which prohibits partial strikes. The statute in question makes it an unfair practice for employees "to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (Wisc. Stats. Sec. 111.06(2)(h)). The State

Supreme Court had held that a partial, intermittent strike, lasting an hour or two each day for twenty-six days, was unlawful under this provision. *Int'l Union UAWA, Local No. 232* v. *Wisconsin Board*, 250 Wis. 550, 27 N. W. 2d 875 (1947). Had it been this Court's view that a partial strike is a concerted activity protected by Section 7, it would have had to strike down the Wisconsin statute, as being in conflict with the National Labor Relations Act. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1950). This Court's refusal in *Briggs-Stratton* to strike down the Wisconsin statute can therefore be viewed only as a holding that a "partial strike" is not a concerted activity protected by Section 7. And Petitioner's present attempt to require equal treatment of partial and complete strikers can accordingly be viewed only as a repetition of its previous attempt to induce this Court to reverse itself in *Briggs-Stratton*.

Whether or not there is a distinction between discharging and replacing economic strikers, *cf. N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1937), is not a real issue in this case, as Petitioner seems to think it is (Petition, p. 18; brief, p. 51). Petitioner insists that Waugh be given the same rights that *Mackay* gives to complete economic strikers; it insists that Respondent violated the Act in *discharging* Waugh, although conceding that there would be no violation if Respondent had merely *replaced* him. But this is to miss the gist of the decision below, of Respondent's argument here, and of *Briggs-Stratton, Conn,* and *Montgomery Ward*. Waugh simply was not an economic striker; he was at the very most a "partial striker". And so the court below held. The Board's attempt to compel treatment of Waugh as an economic striker, besides

having no basis in reason or in the facts of the case, is a legislative attempt of the precise variety which this Court condemned in *Colgate* (*supra*, I. B, 2), a flat challenge of this Court's decision in *Briggs-Stratton*, and a submerged effort to secure the invalidation of the rule of *Conn* and *Montgomery Ward*. Those decisions hold that "partial strikers" are not entitled to the narrowly limited protection which the Act, as construed in *Mackay*, extends to persons who engage in a complete economic strike in a lawful manner and for a lawful objective.

Petitioner has gone to such great lengths in castigating the court below on the general problem of the status of economic strikers that it seems desirable, despite the plain difference between a partial striker and a complete economic striker, to go further into the matter. For the fact is that Petitioner has repeatedly misstated the law concerning the status of economic strikers. It has misstated not only the leading case on the subject, *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, *supra*, but its own decisions. The Board continually speaks of *Mackay* as establishing that economic strikers have an unqualified right to reinstatement to the jobs they vacated, if those jobs remain unfilled when the strikers decide to return to work. It says at one point, for example, that an economic striker "continues to be an 'employee' within the meaning of Section 2(3) of the Act, and is entitled to be reinstated if he has not been replaced." (Board's brief, p. 53.) Both the *Mackay* case and decisions of the Board itself are authority against that proposition. In *Mackay*, the Court stated with perfect clarity that an economic striker has only the same right to employment in the job he vacated as any original applicant for employment would have—that is, the right to have his application for re-employment considered on some basis

other than union membership or activity. At one point, the undivided Court in *Mackay* said:

> "* * * the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by Section 8." (*Id.*, p. 346.)

At another point in *Mackay* the Court said:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings." (*Id.*, at p. 347.)

This language makes it plain that the strikers in *Mackay* — all economic strikers — were not "entitled" to re-employment. They were entitled to have their applications for re-employment considered on a non-discriminatory basis. They were entitled to that and nothing more. Over vigorous dissent by certain Members, the National Labor Relations Board reached the same conclusion in respect of the right of economic strikers. It has held that economic strikers who have not been replaced are not automatically

entitled to reinstatement, but are entitled, instead, like any other "employee," only to have their applications for reinstatement accepted or rejected on some basis other than union considerations. *National Grinding Wheel*, 75 N. L. R. B. 905 (1948); *Container Mfg. Co.*, 75 N. L. R. B. 1082 (1948), enf. den. on other grounds (C. A. 7, 1949) 171 F. 2d 769. See also *N. L. R. B.* v. *Wiltse*, (C. A. 6, 1951) 188 F. 2d 917; *Oklahoma Rendering Co.*, 75 N. L. R. B. 1112 (1948); *Waterman Industries*, 91 N. L. R. B. 1041 (1950); *Old Line Life Ins. Co.*, 96 N. L. R. B. No. 66 (1951); *Colonial Shirt Corp.*, 96 N. L. R. B. No. 104 (1951).

These facts concerning the legal status of economic strikers show in another way the extremity of the Board's error in the present case. The Board continually insists that it is "reasonable" to give "partial strikers" such as Waugh the same status that economic strikers have under the law. When the status of economic strikers is properly understood, it becomes evident that it is impossible to make sense of the Board's proposal. It becomes evident, furthermore, that the Board is actually asking this Court to give "partial strikers" a more favored status than economic strikers have. The Board would hold that persons who respect picket lines are unqualifiedly entitled to reinstatement if their jobs are not filled, whereas, as has just been shown, in belated acquiescence in the rule plainly set forth in *Mackay*, it holds that genuine, economic strikers have a right only to a non-discriminatory basis of selection or rejection for employment.

Suppose that Waugh were accorded the same status that the law—properly understood—accords to economic strikers. He would have been compelled to leave his job entirely, on the ground that he had refused to perform part of his normal duties; on the ground, in other words, that

he had been insubordinate, or that he had violated the portion of the collective agreement which prohibits all interruptions of work (Part IV, *infra*). When he applied for re-employment, assuming he had not been replaced in the meantime, the employer would be free to consider the application for re-employment—free to accept or reject it—on any basis other than a desire to discriminate against Waugh for his union membership and activity. The problem would then be the same as it always has been in this case: did Waugh's refusal to cross a picket line provide a special privilege for his insubordination and his deliberate violation of the collective agreement?

The answer to this question is best found through following the gradual development of the concept of the "unprotected" concerted activity, the concept which this Court and the Courts of Appeals have consistently and patiently developed and which the Congress so plainly approved in 1947. For purposes of this case, the concept is appropriately applied in terms of the words "partial strike." The court below was riding in the main stream of legal development when it held that Waugh's insubordinate action was properly to be described as a partial strike or as a unilateral dictation of terms of employment, and therefore unprotected.

4. The Proviso to Section 8 (b) (4) Does Not Bear Materially on the Issue of This Case.

At various points in the Petition (pp. 17, 19, 23, 24) and in its Brief (pp. 35 *et seq.*), the Board refers to the proviso to Section 8(b)(4) as tending to establish a protected status for Waugh's conduct. The dissenting opinion below is based almost entirely on that proviso. The proviso in question reads as follows:

> ". . . nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any

person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Respondent wishes to offer two points concerning this proviso: first, that thorough analysis will reveal that it ultimately does not materially aid in the disposition of this case; and second, that on the whole such insights and inferences as are reasonably to be gained from the proviso militate against the position taken by the Board here and by the dissenting judge below.

The first of these points follows logically and reasonably upon careful attention to the function of the proviso. The operation of the proviso is internally limited expressly to Section 8(*b*) of the Act, the portion of the Act dealing with *union* unfair practices. The plain intent is to exculpate. Just *who* is exculpated is not quite clear; but be that as it may, the plain intent is to mitigate the burden of Section 8(b) in some manner. To say that the proviso is designed to mitigate the burden of 8(b) is to say that it is designed to make *not* unlawful some form of conduct which might, in the absence of the exculpation, be held to be in violation of the Act. With so much, scarcely anyone may reasonably differ. But the Board wishes to go much further. It wishes to establish that a Congressional disavowal of intent to make certain action *unlawful* amounts to the grant of an *absolute privilege* to engage in such action.

This, we respectfully submit, is cruel and unusual punishment of language, and of meaning. It overrides the manifest point that Congress did its privileging in Section 7. And it overlooks the plain distinction, to which we have already referred, between unlawful acts and absolutely

privileged acts. In our summary of Point II of this brief, we referred to the three categories of (1) absolutely unlawful acts, (2) absolutely privileged acts, and (3) acts which, neither absolutely privileged nor absolutely outlawed, are left for approval or disapproval to the free play of economic and social forces. The Board would now destroy the triple categorization by asserting that every act which is not outlawed must be absolutely privileged. But no citation of external authority is needed in order to rebuff this attempt. The Labor Management Relations Act itself demonstrates in a section to which the Board has not referred that Congress was aware of, approved of, and acted in accordance with this triple categorization.

The section just referred to is the "Saving Provision," Section 502 of the Labor Management Relations Act, which provides that:

> "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. . . ."

This saving provision was designed to allay fears that might be raised by the restrictions on strikes which the Act contains. It was designed to forestall constitutional challenge on "involuntary servitude" grounds. As put in *Senate Report No. 105* on S. 1126 (80th Cong. 1st Sess. p. 30), Section 502 makes it "clear that no provision of the act is to be construed as compelling an employee to render forced labor. . . ." Now, if the Board is correct in arguing that a deliberate refusal by Congress to provide for *legal action* is reasonably to be translated into an *absolute*

immunization, then it would seem to follow that an employer may never discharge *individual strikers*, since the effect of Section 502 is to make it impossible for any court to order individuals to work, even though they are participants in an unlawful strike. But Congress plainly intended no such result. As demonstrated by the excerpt from the House Conference Report reproduced in the Appendix (p. i), Congress assumed that employers had a privilege under the Act to discharge, not only unlawful strikers whom courts could not order to return to work, but even employees who had engaged in lawful, but unprotected, concerted activities. *Cf. Perry Norvell Co.*, 80 NLRB 225 (1948).

Thus, for the Board to say that, because the proviso operates to make a refusal to cross a picket line *not unlawful*, it also prohibits an employer's discharging of persons who refuse to cross a picket line, is simply to beg the question. The question in this case is not whether Waugh's action is made unlawful by Section 8 (b) of the Act. The question, putting it in the proper alternative, is either whether the *Respondent's* conduct is made unlawful by Section 8 (a) (1), or whether *Waugh's* conduct is *absolutely privileged* by Section 7. The proviso does not contribute substantially to either clarification or resolution of that issue.

Furthermore, what contribution the proviso does make is on balance against the Board. The Board argues that the proviso should be viewed as at least an indication of the high regard which Congress had for "traditional" union action. And on that basis the Board urges this Court to proceed to the conclusion that Congress intended in the proviso to immunize a refusal to cross a picket line against employer discipline, regardless of the motivation for the discipline. Careful attention to the language of

the proviso and to the formal explanation of that language in the Committee Reports persuasively suggests an exactly contrary conclusion. In the first place, the proviso does not exculpate *all* respect for picket lines. Instead, it excuses from illegality *only* the respecting of a picket line established by a *majority union*. Such is the impact of the concluding words of the proviso: "a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." Such a qualified exculpation means that in other circumstances—for example a strike not called by a majority union—a refusal might be, not only unprotected, but positively unlawful. Here again, however, it is not necessary to rely on rational inference alone. The draftsmen of the Act expressly said as much:

> "Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strike-breaking activities would not be deemed an unfair labor practice *unless the strike is a "wildcat" strike by a minority group.*" (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. p. 23. Italics supplied.)

This is as much as to say that Congress intended to *outlaw* a refusal to cross a picket line in certain circumstances. If Congress thought so little of the "traditional" respect for picket lines that it contemplated positive outlawry, it would seem impermissible to assert that Congress meant at the same time absolutely to privilege such conduct.

At the least, then, the proviso is irrelevant to the present case; the fact that Congress guardedly disavowed intent

to make certain conduct unlawful in certain circumstances is not persuasive ground for the inference that Congress meant absolutely to privilege that conduct in all circumstances. At the most, the proviso militates against the Petitioner's basic contention that this Court must give complete immunity to a refusal to cross a picket line because of its "traditional" character; for the proviso suggests, especially in the light of the Committee statement just quoted, as in fact do all of the subdivisions of Section 8(b), that Congress was no great admirer of traditional union action.

Petitioner's reference to the proviso obstructs rather than aids in the clarification and the resolution of the issue posed by this case. The basic issue is whether a refusal such as Waugh's belongs in the category of "protected concerted action" as that category is defined in the Act itself and in the Congressional statements, judicial opinions, and National Labor Relations Board decisions which have been presented. To that basic issue we now turn.

5. A Refusal to Cross a Picket Line in the Circumstances of this Case Falls Naturally within the Conception of Unprotected Action held by Congress, the Courts, and even the Board Itself.

Respondent does not contend that every refusal to cross a picket line is an unprotected concerted activity. Respondent urges, instead, only that a refusal in the precise circumstances of this case is unprotected. These circumstances, dealt with in part in Point I of this argument and to be dealt with further in Points III and IV, include (1) the essentially personal and solitary nature of Waugh's conduct; (2) the lack of any "common cause", in any proper sense, between Waugh and the union whose picket line he respected; (3) the entire absence of even an allega-

tion of anti-union motivation in Respondent's discharge of Waugh; (4) the presence of both an implicit and an explicit contractual basis for Respondent's discipline; and (5) the special problems of the newspaper industry, of which it is often said "today's newspaper wraps tomorrow's fish." The last circumstance is not cited in order to secure an exception in favor of the newspaper industry. It is advanced because of the aid it affords in characterizing Respondent's discharge of Waugh. With the time exigencies of the industry given due weight, a form of discipline which might in other circumstances be suspected as at bottom unlawfully motivated, may appear normal, reasonable and entirely justified. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1944). The time factor also heightens the significance of the key clauses in the collective agreement: the clauses prohibiting all interruptions of work, directing speedy adjustment of grievances, and requiring absolute obedience of the orders given by foremen (R. 26, 61). It goes far to clarify the importance to this case of Respondent's determined resistance to union pressures for inclusion in the agreement of a *contractual* right to respect picket lines (Point IV, *infra.*).

Always bearing in mind the limited situation with which this case deals, a decision holding Respondent's conduct an unfair practice could not be squared with the authorities dealt with hereinabove, particularly those discussed in II A of this brief. There would be no way of stating the rule of this case without clashing with any reasonable generalization of the principles for which those authorities stand. *Sands*, for example, establishes the proposition that a genuine strike is not a protected concerted activity where it is designed to impose conditions of employment varying from those established in the collective agreement. As already observed herein, it is difficult to see how individual

action reflecting an individual sentiment can be given protection in the name of Section 7 that this Court in *Sands* denied to genuinely concerted action for mutual aid and protection. *Republic Aviation* establishes that the employer may lawfully restrict employee exercise of the right of self-organization to non-working time. Since there is nothing in the Act which indicates that Congress placed any more emphasis on concerted action than it did on self-organization, and since in fact the two are treated exactly alike in Section 7, it is difficult to see how this Court can penalize Respondent for refusing to permit Waugh to use company time for his own purposes, without departing in essential principle from the position which it took in *Republic Aviation*. Again, in *Briggs-Stratton*, this Court declared that a genuinely concerted action for mutual aid and protection was not absolutely immunized by Section 7. The theory there was that Section 7 protects only those basic and essential labor rights which the law of criminal conspiracy would deny. Those central, basic rights are the right to join a union, the right to bargain collectively, and the right to withhold labor in concert by way of a clean straightforward strike. If this Court should now hold that respecting a picket line is a basic labor right equivalent in statute to those rights, it would negate the strength, the simplicity, and the historical accuracy of its decision in *Briggs-Stratton*. More than that, it would cast the whole question of the scope of Section 7 into endless confusion, with nothing but the Board's vague conception of "traditional labor action" as a guide. *Cf. Colgate-Palmolive-Peet, supra.*

Reversal of the court below in this case would not only cast doubt on the Court's own decisions of the very recent past; it would also appear to be a deliberate affront to the express Congressional hope for continued circumscription of the scope of Section 7, and a refusal to credit the serious-

ness of Congress in confirming the right of employers to discharge for "cause." Congress plainly approved this Court's decisions in *Fansteel, Sands,* and *Southern Steamship, supra.* Moreover, there can be little doubt of its approval of *Briggs-Stratton,* although that decision was handed down after the Act was amended in 1947; and the Congress has not yet formally spoken on the matter. No one can seriously contend that affirmance of the decision of the court below would amount to a flouting of congressional intent.

Waugh's activity falls completely naturally into the category of the "partial strike" or the "unilateral dictation of terms of employment" condemned in *Conn, Montgomery Ward,* and *Home Beneficial Life Insurance Co., supra.* To hold it privileged would be to cast those decisions in serious doubt despite their patent good sense and fidelity to the statute. This would be so because it would seem anomalous to hold that the genuinely concerted action for mutual aid and protection present in those cases is subordinate in status to action such as Waugh's, which was neither concerted nor, in any proper sense, for "mutual aid and protection."

Finally, reversal of the court below would, paradoxically enough, vitiate the doctrinal foundation of some of the most promising of the Board's own recent decisions. The Board has recently held that a slowdown is not protected by Section 7 even though it is a manifestly concerted activity for mutual aid and protection. *Elk Lumber Company,* 91 NLRB 333. The Act does not *expressly* declare that a slowdown is not a concerted activity within the meaning of Section 7. There is no hint in the Act itself that Congress intended to make a slowdown unlawful. One cannot even accurately state that the slowdown and asso-

ciated techniques are not "traditional" labor activities (*cf. Slichter, Union Policies and Industrial Management,* 164 *et seq.* (1941)). On what basis, then, does the Board hold a slowdown unprotected? The answer, interestingly enough, is that the Board has built on the theory of *Briggs-Stratton, Conn, and Montgomery Ward, supra.* That it has done so is apparent from its citation of *Briggs-Stratton* (called the *"Wisconsin"* case in the following quotation) and its paraphrase of language from *Conn* and *Montgomery Ward* in developing its rationale:

> "The vice of the slowdown derives in part from the attempted dictation by employees, through this conduct, of their own terms of employment. They are accepting compensation from their employer without giving him a regular return of work done. In the *Wisconsin* case, the Supreme Court recently likened to a slowdown a union's intermittent work stoppages following unsuccessful bargaining negotiations and described both as 'coercive.'
>
> "In the instant case, by engaging in the slowdown, the Union subjected the Respondent to a partial strike designed to bring pressure for acceptance of its terms." *Phelphs Dodge Copper Products Corp.,* 101 NLRB No. 103 (Nov. 1952) at page 10 of the mimeographed report.

In another very recent case, *Crucible Steel Castings Company,* 101 NLRB No. 105, the Board has again revealed its implicit agreement with the view of the law which Respondent urges upon the Court here. *Crucible* is a case involving the discharge of one Flagg, a "shop chairman" whose duties involved the processing of grievances. The discharge was based on Flagg's defiance of posted company rules requiring employees to stay at their jobs unless permission to leave was granted, and on his failure to

abide by the rules fixed in the collective agreement concerning the processing of grievances. Specifically, Flagg had left his job to investigate grievances during working time, without securing permission, and had at times infringed upon working time in connection with grievance conferences which had started during free time. This had gone on for some time before the employer fired Flagg, after having warned him twice, on the day of the discharge, to abide by the shop rules. Rejecting the contention that the discharge restrained or coerced Flagg in the exercise of rights granted by Section 7, the Board said:

> "In view of Flagg's violation of shop rules, his refusal to comply with his foreman's direction to return to work, and, particularly, his persistence in disregarding the provisions in the contract for handling grievances, we find that Flagg's discharge was not in violation of Section 8 (a) (3) and (1) of the Act." (*Id.* at p. 2, mimeographed report.)

We have contended at various points that the Board is asking the Court in this case to reverse its own decision in *Briggs-Stratton* and to reject the holdings in *Conn* and *Montgomery Ward*. We must now add that the Board apparently seeks the vitiation of its own holdings and rationale in such cases as *Elk Lumber, Phelps Dodge* and *Crucible Steel, supra*. That it is accurate so to characterize the Board's position here becomes evident when one considers that the statement quoted from the Board's decision in *Phelps Dodge* is a virtually perfect description of Waugh's conduct in this case: an "attempted dictation by [an employee] . . . of [his] . . . own terms of employment"; an "accepting [of] compensation from [the] . . . employer without giving him a regular return of work done;" "a partial strike. . . ."

The slowdown condemned by the Board in *Phelps Dodge* was effected by a majority union during bargaining negotiations. It was, therefore, a genuinely concerted action for mutual aid and protection. We of course do not contend that merely by virtue of its being such, it was entitled to the protection of Section 7. We are simply unable to understand how the Board can hold as it did in *Phelps Dodge* and at the same time argue to this Court that an individual act having only a very dubious claim to the description of "concerted activity for mutual aid and protection" is entitled to the protection of Section 7.

We respectfully submit that the Board's rationale in *Phelps Dodge* bears out our major contention: A refusal to cross a picket line in the circumstances of this case falls naturally within the conception of unprotected concerted action which the courts and the Board have fashioned, and which Congress has approved.

Crucible is even closer to the present case, making Respondent's position here virtually an *a fortiori* one. In *Crucible*, the dischargee was beyond any question engaging in the kind of activity with which Section 7 is concerned. The prosecution of grievances is inherently a part of the concept of collective bargaining and mutual aid and protection. *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262; *Olin Industries, Inc.*, 86 N.L.R.B. 203; *Weisfields, Inc.*, 88 N.L.R.B. 541. Nevertheless the Board held in *Crucible*, as it has indeed held previously (*Conversa Bridge & Steel Co.*, 49 N.L.R.B. 374; *Empire Box, Inc.*, 79 N.L.R.B. 1011), that such activities must be prosecuted in free time, that certainly they may not be pursued during working time where the employer's rules and specific orders prohibit such inroads upon working time.

Conclusion on Point II.

The statute, the clearly expressed congressional intent, and the uniform course of decision militate directly against the position advanced by the Petitioner and in favor of the Respondent's position. The Petitioner's view finds no support in the statute or in the relevant authorities. Moreover, Petitioner argues explicitly for the rejection of the conclusions reached by the Courts of Appeals in *Conn, Montgomery Ward,* and *Home-Beneficial Life Insurance Co., supra,* and implicitly for reversal by this Court of its decision in *Briggs-Stratton.* Beyond these considerations, Petitioner's view would disperse into confusion the conception of the statute first voiced by this Court in *Jones & Laughlin, supra,* and consistently maintained throughout the cases discussed in this brief, to the present day. Finally, Petitioner's present contention is inconsistent with even its own decisions—and very recent ones at that.

III.

A discharge of an employee does not violate Section 8(a)(3) where it is not intended to encourage or discourage membership in any labor organization, and could not conceivably have any effect of that kind.

In its decision and order (93 NLRB 336), the Board held that Respondent had in discharging Waugh violated Section 8(a)(3). That position was maintained by the Board in the proceedings before the court below. Nothing is made of it, however, in the Board's petition for certiorari

or in its brief.[7] Respondent deals with the point because analysis of the facts in the light of Section 8(a)(3) and the authorities thereunder aids materially in clarifying other issues posed by this case and accordingly in the reaching of a proper result.

Section 8(a)(3) provides in material part that it is an unfair practice for an employer

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

From the beginning, this provision has never been thought to provide complete immunity for union members against discharge or any other form of discipline.

Thus in *Jones & Laughlin*, 301 U. S. 1, 45 (1936):

> ". . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when

[7] The only reference to Respondent's discharge of Waugh as a violation of Section 8(a)(3) is to be found in footnote 32 on page 66 of Petitioner's brief. There the suggestion is made that the discharge violated 8(a)(3) because it "thus discouraged membership" in the *Typographical* Union. This is an almost incredible caricature of illegality by presumption. It is plainly the kind of arbitrary and unreasonable action by the Board which the 80th Congress so frankly condemned and which it hoped to forestall by the changes it made in Sections 10(b), (c) and (e). *Sen. Rep. No. 105* on S. 1126, 80th Cong., 1st Sess. p. 26, 26; H. R. Rep. No. 510 on H. R. 3020, 80th Cong. pp. 53-56. Cf. *N. L. R. B.* v. *Universal Camera Corp.*, 340 U. S. 474 (1950).

that right is exercised for other reasons than such intimidation or coercion."

The Court has expressed itself similarly ever since. *Associated Press* v. *NLRB*, 301 U. S. 103 (1936); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1937); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1938); *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1938); *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1940); *Phelps Dodge* v. NLRB, 313 U. S. 177 (1940); *Southern S. S. Co.*, v. *NLRB*, 316 U. S. 31 (1941). And as recently as this year, in *NLRB* v. *American National Insurance Co.*, 343 U. S. 395 (1952), this Court used similar care in defining the extent to which the Act has qualified the pre-existing rights of employers.

A certain amount of diffusion of doctrine is inevitable in connection with any provision which has been litigated so often and so variously as Section 8(a)(3). Nevertheless, decisions by both the Board and the Circuit Courts of Appeals establish certain well-defined prerequisites to a violation of the section. At the most, the courts have required the Board to prove that a discriminatory discharge has had the *actual effect* of encouraging or discouraging membership in a labor organization. *NLRB* v. *Air Associates, Inc.*, (C. A. 2, 1941) 121 F. 2d 586; but see *NLRB* v. *Cities Service Oil Co.*, (C. A. 2, 1942) 129 F. 2d 933; *Stonewall Cotton Mills, Inc.* v. *NLRB* (C. A. 5, 1942) 129 F. 2d 629; *Western Cartridge Co.* v. *NLRB*, (C. A. 7, 1943) 139 F. 2d 855.

At the least, the Courts have required proof of *intent* to encourage or discourage union membership and *probability* that union membership will be discouraged. *N. L. R. B.* v. *J. G. Boswell Co.* (C. A. 9, 1943) 136 F. 2d 585; *N. L. R. B.* v. *Brezner Tanning Co, Inc.* (C. A. 1, 1944) 141 F. 2d 62; *N. L. R. B.* v. *Vail Mfg. Co.* (C. A. 7, 1947) 158 F. 2d 664.

It had become well settled by 1947, when the Act was amended, that a discharge which the evidence demonstrated to be motivated by normal business considerations, rather than by a desire to encourage or discourage union membership, did not violate the Act. *Biles-Coleman Lumber Co.*, 4 NLRB 679 (1937); *Link Belt Co.*, 26 NLRB 227 (1940); *N. L. R. B.* v. *Williamson-Dickie Mfg. Co.* (C. A. 5, 1942) 130 F. 2d 260; *N. L. R. B.* v. *Kopman-Woracek Shoe Mfg. Co.* (C. A. 8, 1946) 158 F. 2d 103; *N. L. R. B.* v. *Reynolds Int'l Pen Co.* (C. A. 7, 1947) 162 F. 2d 680; *N. L. R. B.* v. *Reliable Newspaper Delivery Inc.* (C. A. 3, 1951) 187 F. 2d 547.

In 1947, Congress crystallized this general development by providing, in Section 10(c), that the Board has no power to award reinstatement and back pay to employees who have been discharged for cause, and by stating that "This, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." *House Conference Report* No. 510, 80th Cong. 1st Sess., pp. 38-40 (App. p. i).

The Board in this case awarded reinstatement and back pay to an employee who was discharged for "cause", as that term had been established by the weight of authority prior to 1947 and as it was understood by Congress when it amended the National Labor Relations Act in 1947.

The most attentive perusal of the Board's decision in this case fails to turn up any evidence of an effort by the Board to satisfy even the minimal requirements of proof of an 8(a)(3) violation which have been established in the seventeen years of interpretation which that section has undergone.[8] The reason for this failure is of course clear. The undisputed facts of this case are such that not even the minimal requirements could be shown. The Respondent

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[8] See Footnote 7, *supra*.

has dealt for forty years with Waugh's union. Waugh has been a member of that Union for over twenty years and an employee of Respondent for seven years. Respondent repeatedly urged Waugh to reconsider his refusal to cross the picket line, before firing him (R. 64 *et seq.*) How such facts could be reconciled with an intention to discourage Waugh's membership in a labor organization—an intention which the Board has made no effort to demonstrate—is impossible to understand. Equally impossible to understand is how the discharge of Waugh could have had even the *possible* effect of discouraging his membership in either his own union, the Typographers, or any other union. So far as is known, Waugh never sought membership in the Typographer's Union; and it is virtually certain that if he had, his application would be denied for lack of suitable qualifications. Finally, the evidence will not yield to a characterization of the discharge as "capricious." *E. Hubschman & Sons, Inc.*, 14 NLRB 225 (1939).

By a process of elimination then, we reach the conclusion that the discharge must have been for "cause." And the indisputable "cause" was Waugh's refusal to perform all of his duties. From Waugh's point of view, his refusal to cross the picket line "caused" his discharge. But Waugh's is not the point of view which is relevant here. The relevant point of view is that of the employer, the person charged with an unfair practice the existence of which turns upon his motivation. *Jones & Laughlin, supra,* and other cases cited. From the point of view of the employer, the vital, operative fact was, not that Waugh had respected a picket line, but that Waugh's refusal to perform the duties he was being paid to perform amounted to a violation of explicit and implicit contractual arrangements and obstructed the business operations which those contractual

arrangements were designed to serve. The employer would have reacted in the same way if Waugh had neglected his duties in order to go to a ball game, or a race track, or a movie.

There is therefore no basis for the Board's holding that Respondent violated Section 8(a)(3). The discharge was for cause, within the meaning of Section 10(c). That is what the permanent impartial chairman held (R., p. 69), and it has never been disputed, for, as we shall now demonstrate, Waugh's conduct was a plain violation of his understanding with Respondent as expressed in the collective agreement and in the implicit contract of employment.

IV.

A discharge for a deliberate violation of both an implicit contract of employment and a collective agreement is a discharge for cause and not a violation of the Act.

Waugh's refusal to perform all the work he had undertaken to perform was, as we shall presently demonstrate, a plain, knowing, and deliberate violation of both the spirit and the letter of the collective agreement between Respondent and Waugh's union, the Newspaper and Mail Deliverers' Union. As such it provided a complete justification for his discharge, under the Act and the relevant precedents.

Petitioner asserts that since it has in a separate proceeding held the whole contract invalid because of an invalid union-security provision (94 N. L. R. B. 1056), and since the court below failed to pass on the contract, "no contract issue obscures consideration of the important questions presented here." (Petition, p. 9, note 3.) This is entirely too convenient and airy a dismissal of a most significant

factor in this case. Full appreciation of this case requires consideration of the collective agreement, which still governs relations between Respondent and Waugh's Union and which the Board itself has taken no steps in court to dissolve. Furthermore, the Board has plainly misrepresented the status of the agreement. In its brief (p. 8, note 3), the Board asserts that the Second Circuit, in *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719 (1952) (certiorari pending as No. 371 this Term), entered a decree enjoining performance of the contract in question. That statement is flatly wrong. In fact, the Second Circuit expressly refused to invalidate the whole contract. It said, in referring to the contract, that:

> "The illegality in this contract lay solely in the union's failure to secure prior approval from a majority of employees for the union-security clause—a requirement since abolished by Congress in 1951 as burdensome and unnecessary. That approval can no longer be secured at this late date, nor is it necessary to any new contract." (*Id.*; p. 724.)

And it went on, after noting that the total invalidation of the contract urged by the Board would serve no good purpose, expressly to deny enforcement of those parts of the Board's order which would negate the entire contract and future relations between the union and the employer:

> "We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification." (*Id.*)

These are the Second Circuit's words in the *Gaynor* case. They demonstrate the error in Petitioner's statement to

this Court that the contract in question has been invalidated by the Second Circuit.

Far from "obscuring" the "important questions presented here," the collective agreement between Respondent and the Newspaper & Mail Deliverers' Union constitutes one of the vital, operative facts of this case. Of course, facts are sometimes unwieldy and intractable elements; they sometimes embarrass and hinder the reaching of a result which has been formulated on an arbitrary and *a priori* basis. In such circumstances, the convenient thing to do is to forget them, or, even better, to act as though the facts do not exist. But such an attitude toward the facts of a case perverts the judicial process and tends to produce a more or less damaging flaw in the decision. In any event, disregard of facts scarcely tends to clarify consideration of a case. So, here, it is difficult to find any good reason for the Board's continued insistence upon disregard of the collective agreement which governed employment terms and conditions in Respondent's business at the time Waugh was discharged.

Along with the usual provisions to be found in most collective agreements, the agreement in question contains a provision prohibiting all strikes, lockouts, or other types of cessations of work or interferences therewith.[9] The full text of this provision runs as follows:

> "19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, order or award of the Adjustment Board." (B. A. 61)

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[9] It is interesting to note that the Board refers to this provision as if it contained only a prohibition of strikes. (Petitioner's brief, p. 63, note 27.) The Board omits any reference to the prohibition of "other cessation of work or interference therewith."

The value of this provision to Respondent and the newspaper industry can scarcely be exaggerated. Time is of the essence—there is nothing more moribund than the last edition's headlines. Even the briefest of work stoppages or quickie strikes causes serious loss and operational embarrassment. The Board itself recognized the tremendous impact of "quickies" upon the Metropolitan Press. *Cf. Jaffe* v. *Newspaper & Mail Deliverers' Union*, 97 F. Supp. 443 (S. D. N. Y. 1951).[10] One need not dwell at length, therefore, upon the concessions which Respondent has had to make and the determination which it has had to exercise during the forty years of its dealing with the Union, to preserve this provision.

In 1948, the Union proposed for incorporation in the collective agreement a clause providing that:

"No man shall be required to cross a picket line."

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[10] The Board sought an injunction in the United States District Court for the Southern District of New York restraining the Newspaper and Mail Deliverers' Union

> "from violating Section 8(b) subsection (2) of the Act, in any manner by causing or attempting to cause the Times, Mirror, News, Herald Tribune, Journal-American, or any other newspaper in New York or vicinity to discriminate in any manner against employees in violation of Section 8(a), subsection (3) of the Act."

Judge Leibell granted a permanent injunction, after a nine day hearing, which completely reviewed the course of unlawful conduct of the Newspaper and Mail Deliverers' Union and its officials and the impact of that course of conduct upon the delivery of newspapers in the Metropolitan area. In its opinion, the Court used the following language:

> "A free press is essential to the perpetuation of our form of government. To permit a comparatively few men to halt the publication of our city newspapers, in order to accomplish a clearly illegal purpose, is too great a threat to our freedom to let it go unchallenged. We should learn from the experience of people in other lands. Although I am opposed to the issuing of injunctions against labor unions, there are at times situations of great public interest where the reckless and law-defiant conduct of a few cannot otherwise be controlled. This is such a case." (97 F. Supp. 443, 450.)

The Respondent and other newspaper wholesalers vigorously opposed the provision. It was never incorporated in the agreement.

Respondent at the hearing in this case offered to prove that Waugh was one of the persons who had urged the rejected clause (R. 70).

In the light of this factual background, it seems accurate to state that Waugh's refusal to enter the *Star* premises in the normal performance of his duties was the plain, knowing, and deliberate violation of both the spirit and the letter of the collective agreement which we have already called it.

Ever since *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939), it has been accepted that employees who violate collective agreements render themselves vulnerable to discharge. As was said in that case: "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (Id. at 344). The Board itself has often used such language as the following, in decisions holding that an employer may discharge employees who have violated an agreement: "The right of discharge for violation of contract, is well established." *Copperweld Co.*, 75 NLRB 188, 194; see also *National Electric Products Corp.*, 80 NLRB 995.

Under the facts and the authorities gathered here and in the preceding point there can be no doubt whatsoever that the discharge of Waugh did not violate the Act. But a remaining question is whether, because the Board found unlawful provisions in the collective agreement, the whole agreement has become irrelevant to this case.

As a matter of the general law of contracts, it seems fairly evident that the agreement remains a binding contract, despite the Board's holding that its union security clause and other provisions violated the Act. The contract

contains a "separability" clause which states that: "In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect." (R. 60-61). Normally at common law, even in the absence of such a separability clause, the performance of legal provisions of a contract will be enforced in accordance with the intention of the parties despite the illegality of other, distinct promises contained in the agreement. American Law Institute, Restatement of Contract, Section 607. All the authorities, from antiquity to the present day, support this proposition. *Holdsworth* (8 History of English Law 53 *et seq.*) quotes from *Pigot's* case, (1615) 11 Co. Rep. at f. 27b to this effect: "It is unanimously agreed in 14 H. 8 25, 26 that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good." The modern writers and authorities concur. Corbin agrees that the decisions enforcing valid parts of an agreement which contains unlawful provisions are justifiable, although "only on the ground that the illegality was not heinous in character, partial enforcement does not harm the public, and refusal of enforcement would be too severe a penalty or cause an unjust forfeiture." 6 Corbin on Contracts §1522, p. 1009. *Williston*, nodding to *Pigot's* case, has this to say: "It was early decided that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. . . . If legal consideration has actually been given . . ., the rule thus early established has never been questioned." 6 Williston on Contracts §1779, p. 5060. Squarely in point are the cases cited in support of the proposition: *Gelpcke* v. *Dubuque*, 1 Wall. (68 U. S.) 221;

McCullough v. *Virginia*, 172 U. S. 102; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584. The Court in the latter case quotes approvingly (at p. 590) the blunt language used in *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. C. 235, 250: "... where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

The agreement involved in the present case was invalidated by the Board on two grounds: (1) because it contained a union-shop provision whose execution had not been authorized by the employees in the kind of election then required by the Act, but not now required (Act of October 22, Pub. L. 189, 82nd Cong., 1st Sess.); and (2) because it granted to union members greater "fringe benefits" than were accorded non-union men. *Rockaway News Supply Co.*, 94 NLRB 1056, 1058.

There can be little doubt that these features, besides being but a relatively minor part of the agreement, were clearly divisible from those lawful provisions which formed far the greater and more essential parts of the agreement. The Board's own decision and order in the case show how readily the illegal aspects could be remedied, without destruction of both the whole contract and the orderly industrial relations which the contract represented and which the Act was designed to promote. In that decision the Board ordered the employer and the union to cease giving effect to the unlawful union shop clause and to make the nonunion employees whole for the fringe losses they had suffered.

Thus, even on the basis of Corbin's test, *supra*, it would appear that the Board has gone too far in invalidating the whole contract. The illegal provisions were clearly

separable; "the illegality was not heinous in character"; enforcement of the lawful provisions would not "harm the public"; and "refusal of enforcement would be too severe a penalty or cause an unjust forfeiture." (*Corbin, supra.*)

There is a serious question, furthermore, as to the bare power of the Board to vitiate the whole contract, at least for general purposes. The Board could refuse to consider the contract a bar to an election, if another union should file a representation petition, since the concept of an existing contract as a bar to an election is one of the Board's own making. (*House Conference Report* No. 510 on H. R. 3020, 80th Cong. 1st Sess., p. 50.) But total vitiation is another matter. The collective agreement has been recognized in Section 301 of the Labor Management Relations Act 1947 as a lawful contract in interstate industries. 61 Stat. 136 (1947), 29 U. S. C. § 141 *et seq.* (1950). It has long been regarded as such in the State of New York. *Hudak* v. *Hornell Industries, Inc.*, 304 N. Y. 207 (1952). No one has ever suggested that, in addition to its other duties, the Board was given the function of administering the general contract law of the nation. Whether or not its holding in *Rockaway* could lawfully operate to vitiate an agreement made enforceable by both federal and state law would therefore seem dubious, especially in the light of decisions by this Court. Thus in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 235 (1938), the Court said:

> "* * * the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. * * * We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

Presumably the Board could invalidate the contract if it were made with a union which was not genuinely the representative of a majority of the employees in the appropriate bargaining unit. *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940)). But it has never been contended, let alone held, that the Newspaper and Mail Deliverers' Union is dominated by the employers with whom it deals. The *Jaffe* case, *supra*, contains proof to the contrary. In fact, the forty years of bargaining between the union and Respondent have fully satisfied the definition of "arms-length" bargaining advanced in the relevant decisions of this Court. *NLRB* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282 (1941); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U. S. 318 (1939); *NLRB* v. *Falk Corp.*, 308 U. S. 453 (1939); *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1940); *NLRB* v. *Pacific Greyhound Lines*, 303 U. S. 272 (1937); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1937); *NLRB* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1942); *NLRB* v. *Virginia Electric and Power Co.*, 314 U. S. 469 (1941); *Westinghouse Electric & Mfg. Co.* v. *NLRB*, 312 U. S. 660 (1940).

In the circumstances, invalidation of the entire contract was neither called for nor authorized by the Board's power and duty to effectuate the policies of the Act. Invalidation of the entire contract could serve only to frustrate the policies of the Act. By vitiating the end-product of the collective-bargaining process, the Board actually threatened the industrial peace and order which the Act was designed so wholeheartedly to promote.

But it is difficult to see how the Petitioner gains in this case from insisting that the collective agreement be disregarded. Absence of a collective agreement does not destroy either the employer-employee relationship, with all its attendant common-law rights and duties, or the implicit contract of employment which necessarily governs

any employment relationship in a free society. In the absence of a collective agreement, the employee is not freed of the obligation of following the lawful orders issued by the employer or his duly designated agents. On the contrary, at common law, and in the absence of an agreement to the contrary, the relationship of master and servant obtains. *Pennsylvania Casualty Company* v. *Elkins*, 70 F. Supp. 155, 159 (1947). And the common law had no doubts concerning the right of the master to direct his working force, the right of the master to discharge the insubordinate or unwilling employee. *Horowitz* v. *Daily Mirror*, 258 N. Y. S. 39. *In re Nowicki's Claim*, 289 N. Y. 566; *In re Electrolux Corp.*, 286 N. Y. 390.

Thus, even assuming the absence of a collective agreement, the situation remains the same. The Respondent discharged Waugh because, as the arbitrator found, Waugh had been insubordinate in refusing to obey his foreman's order. Whether the insubordination be held a violation of the collective agreement or of the implicit contract of employment, it provides the basis of the discharge; and the discharge, therefore, is a discharge for "cause." The fact that the insubordination was expressed in a refusal to cross a picket line can scarcely alter the case, as we have shown at such length, in Point II, *supra*. As shown there, the Board itself has held that neither a slowdown nor the prosecution of grievances, although both are more clearly Section 7 activities than Waugh's action here, provides a privilege for insubordination. *Elk Lumber Co.*, *Phelps Dodge*, *Crucible Steel*, *supra*. The Courts of Appeals have held that neither a concerted refusal to work more than a certain number of hours (*Conn*, *supra*), nor a concerted insistence on performing only a part of one's duties (*Montgomery Ward*, *supra*), nor a concerted refusal to report to work (*Home Beneficial*, *supra*), privileges defiance of

the employer's lawful orders. Finally, this Court has held that an "installment-plan strike" is, though manifestly concerted action, not a concerted activity protected by the Act (*Briggs-Stratton, supra*); and that a strike to compel a violation of a collective agreement, again manifestly concerted action, is not protected concerted activity (*Sands, supra.*)

These cases, together with the authorities and the considerations advanced in the preceding point of this brief—establishing the right of the employer to discharge for "cause"—demonstrate the legality of Respondent's discharge of Waugh. The House Conference Report spoke definitively for Congress on the subject matter of this case when it said that the employer's right to discharge employees for "cause," expressly preserved in Section 10(c) of the amended Act, "applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." (Appendix, p. iii).

Conclusion.

For the reasons stated, the judgment of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX.

From House Conference Report No. 510 on H. R. 3020, 80th Cong., 1st Sess. (pp. 38-40):

RIGHTS OF EMPLOYEES

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First,* it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second,* it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of Section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.,* 149 F. 2d 987 (1944)).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company* case (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage stabilization laws. Again, in the *Scullin Steel* case 65 N. L. R. B. 1294) and in the *Dyson* case (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products* case (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended

National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practical, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted

activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) ~~By~~ discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organiza-

tion has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

(c) * * * No order of the Board shall require the reinstatement of an individual as an employee who has been suspended or discharged, or the pay-

ment to him of any back pay, if such individual was suspended or discharged for cause.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *